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No. _____

In The

Supreme Court of the United States

October Term, 1997

RAMSEY S. AGAN,

Petitioner,

vs.

JAMES VAUGHN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Issue One: Whether the First Amendment guarantees that a clearly non-contingent local campaign contribution within applicable state contribution limits may be made for the purpose of obtaining "access" to the recipient or other benefited party in order to lobby for a pending or proposed legislative or administrative matter of interest to the donor *without necessarily constituting bribery* under broadly-worded state bribery statutes?

AND, IF SO:

Issue Two: Whether the vagueness and overbreadth of Georgia's 1851 Bribery Statute, which (like similar antique bribery statutes in other states) makes it illegal to give an official (even an elected official entitled to receive campaign contributions) anything of value for the purpose of "influencing" the recipient in the performance of an act "related" to his or her office, as accurately embodied in the trial court's jury charge according to the state Supreme Court, violated Petitioner Agan's Due Process/First Amendment/Equal Protection rights by failing to provide the jury some minimally-rational basis on which to differentiate in the case of an elected official between (i) a clearly non-contingent campaign contribution within applicable state contribution limits made merely to obtain access to discuss the merits of a proposal and lobby for it and (ii) a bribe?

Issue Three: whether the vagueness and overbreadth of Georgia's 1851 Bribery Statute, which (like similar

QUESTIONS PRESENTED – Continued

antique bribery statutes in other states) makes it illegal to give an official (even an elected official entitled to receive campaign contributions) anything of value for the purpose of "influencing" the recipient in the performance of an act "related" to his or her office, as accurately embodied in the trial court's jury charge according to the state Supreme Court, violated Petitioner Agan's Due Process/First Amendment/Equal Protection rights by failing to provide the jury some minimally rational basis on which to differentiate in the case of an elected official between (i) an "acceptable" (or legal) influencing campaign contribution and (ii) a "bad" (or illegal) influencing campaign contribution, especially in light of the state court's charge to the jury that (a) they could infer the requisite criminal intent, *i.e.*, to influence a specific vote, if it was the "natural and probable" consequence of the act of making a substantial campaign contribution and (b) a legal campaign contribution can be made for one purpose and one purpose only, *i.e.*, that of influencing the nomination or election of the recipient – so that the jury was set free to convict Petitioner Agan on the basis that any large campaign contribution made in the context of a pending or imminent legislative or administrative matter involving the donor should be deemed illegal, given the prevalent, cynical, and perhaps justified assumption (especially in states like Georgia that allow or allowed campaign contributions to state and local officials in unlimited amount or amounts well in excess of applicable federal limits on contributions to congressional and presidential candidates, subject only to reporting requirements, and in

QUESTIONS PRESENTED – Continued

cases where large federal "soft money" contributions are involved) that such large campaign contributions do have the "natural and probable" hybrid consequence (and hence, under Georgia law and that of other states, the presumed corrupt purpose) of influencing their recipients or intended beneficiaries in the performance of their official acts?

Issue Four: whether the state court was under a Due Process/First Amendment/Equal Protection obligation to give the jury (at a minimum) (a) some type of prophylactic instruction to the effect that a campaign contributor may *not* be convicted of bribery simply on the basis of the presumed criminal intent that may arise from a juror's conviction that the "natural and probable" consequence of any large campaign contribution is to influence the recipient in the performance of subsequent official acts of known benefit to the contributor and/or (b) a list of "something more" factors to help the jury differentiate under the First Amendment an "acceptable" from an illegal influencing campaign contribution – because otherwise it is mere speculation that the jury convicted on a permissible basis rather than on an impermissible basis?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Ramsey S. Agan (hereinafter, "Mr. Agan") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit affirming a decision by the United States District Court for the Northern District of Georgia (Atlanta Division) to deny his Petition for a Writ of *Habeas Corpus*.

OPINIONS BELOW

The Opinion by the Eleventh Circuit is reported at 119 F.3d 1538 (1997) and reprinted as Appendix A at App. 1. The unreported Order of the District Court adopting the report and recommendation of the Magistrate Judge and denying the Writ of *Habeas Corpus* is reprinted as Appendix E at App. 80. The report and recommendation of the Magistrate Judge is contained in the unreported Order by the District Court reprinted as Appendix F at App. 83. An earlier related decision by the Georgia Court of Appeals ("Agan I") sustaining Mr. Agan's constitutional challenge to the jury charge in his bribery trial, albeit by giving a saving construction to the local bribery statute, is reported at 191 Ga. App. 92, 380 S.E.2d 757 (1989), and reprinted as Appendix I at App. 113. The decision of the Supreme Court of Georgia ("Agan II"), reversing the Court of Appeals in part and reinstating Mr. Agan's conviction, but affirming its remand to the trial court for a hearing on Mr. Agan's claim of selective prosecution, is reported at 259 Ga. 541, 384 S.E.2d 863 (1989), *cert. denied*, 494 U.S. 1057, 110 S.Ct. 1526 (1990)

(No. 89-1246), and reprinted as Appendix H at App. 97. The Georgia Court of Appeals ("Agan III") affirmed the trial court's eventual rejection of Mr. Agan's selective prosecution claim: 203 Ga. App. 363, 417 S.E.2d 156 (1992), *aff'd*, 262 Ga. 783, 426 S.E.2d 552 (1993), *cert. denied*, 510 U.S. 819, 114 S.Ct. 74 (1993) (No. 92-1903). *See* Appendices L, M, N & O at App. 138, 140, 150 & 153, respectively.

JURISDICTION

The decision of the Eleventh Circuit, affirming the denial of Mr. Agan's Petition for a Writ of *Habeas Corpus*, was entered August 27, 1997; and a timely Petition for Rehearing was filed. That Petition for Rehearing was denied on October 31, 1997. (*See* Appendix B at App. 30.) This Court has jurisdiction to review the Judgment of the Eleventh Circuit by Writ of *Certiorari* pursuant to 28 U.S.C. §1254(1). The Petition is timely by virtue of 28 U.S.C. §2101(c) and Rules 13.1 & 13.4 of this Court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Section One of Amendment XIV to the United States Constitution provides in pertinent part that:

> No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Amendment I to the United States Constitution provides in pertinent part that:

> Congress shall make no law . . . abridging the freedom of speech . . . ; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Georgia Bribery Statute, Official Code of Georgia Annotated Section 16-10-2(a)(1), provides as follows:

> A person commits the offense of bribery when: (1) He or she gives or offers to give to any person acting for on behalf of the state or any political subdivision thereof, or of any agency of either, any benefit, reward, or consideration to which he or she is not entitled with the purpose of influencing him or her in the performance of any act related to the functions of his or her office or employment . . . .

The complete Georgia Bribery Statute is reprinted as Appendix P at App. 159; and other Georgia statutes relevant to the Questions Presented are reprinted as Appendices Q, R, S & T at App. 162, 163, 164 & 166, respectively.

STATEMENT OF THE CASE

COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE:

Mr. Agan was convicted on January 29, 1988, in the Superior Court of DeKalb County, Georgia, of the bribery of public officials under O.C.G.A. §16-10-2(a)(1). After exhausting his state remedies, Mr. Agan began serving his sentence on October 17, 1994.

On May 5, 1995, Mr. Agan filed a Petition for Writ of *Habeas Corpus* pursuant to 28 U.S.C. §2254 in the Northern District of Georgia.

On December 20, 1995, the District Court adopted the Magistrate Judge's Report and Recommendation and denied Mr. Agan's Petition. Mr. Agan filed his Notice of Appeal to the United States Court of Appeals for the Eleventh Circuit on January 17, 1996; and the District Court issued a Certificate of Probable Cause for Appeal on February 27, 1996.

Subsequent to the filing of his Petition, Mr. Agan was released from state custody on parole.

On August 27, 1997, the Eleventh Circuit affirmed the Order of the District Court.

OPERATIVE FACTS:

The Magistrate Judge's Report and Recommendation summarizes the facts surrounding Mr. Agan's criminal conviction by quoting from the opinion of the Georgia Supreme Court in *Agan II, supra*, as follows:

> Agan, the Honorary Turkish Consul in Atlanta, sought a building height variance for the construction of a hotel on his property. Agan and Sarper, an Emory University professor, had discussed with officials of the Emory Medical Clinic a plan to bring Turkish patients to the Clinic who would stay at the hotel. The DeKalb County Commission had twice rejected Agan's application for a variance. Agan submitted a third application, and spoke with two DeKalb County commissioners, Lanier and Fletcher, inquiring what Agan could do to insure the approval of his application. Agan told Fletcher

> he had a number of friends in the local Turkish-American Association who wished to contribute to Fletcher's campaign. At a meeting between Agan and Fletcher, Agan urged Fletcher to support the variance application, then left Fletcher with four checks totaling $3,700.00, made to Fletcher personally, and marked "for campaign contribution," despite Fletcher's protests that he did not even have a campaign bank account. The checks were drawn on the accounts of Sarper and three others who testified they were reimbursed for the checks by Agan and believed Agan wanted contributions to come from different people in order to give the impression he enjoyed broad support in the Turkish community. After another meeting between Agan and Fletcher in which Agan reiterated his need for the variance, Agan presented Fletcher with a fifth check for $800.00 marked as a campaign contribution, from a third party. Agan, accompanied by Sarper, also met with Lanier to discuss the variance. As they left Lanier's office, Sarper gave Agan an envelope at Agan's request and, back in Lanier's office, without Sarper, Agan presented Lanier with the envelope containing Sarper's check to Lanier for $3,000.00 marked "campaign contribution," despite Lanier's statement to him that he was not up for reelection for three years.

See Appendix F at App. 85-86, *quoting Agan II, supra,* 259 Ga. 541, 384 S.E.2d 863, 864-65 (1989), *cert. denied,* 494 U.S. 1057, 110 S.Ct. 1526 (1990).

As a result, Mr. Agan was indicted on August 20, 1987, on three counts of bribery under O.C.G.A.

§16-10-2(a)(1), Georgia's 1851 Bribery Statute, which proscribes giving a public official "any benefit, reward, or consideration to which he . . . is not *entitled* with the purpose of *influencing* him . . . in the performance of any act related to the functions of his . . . office."

The trial court rejected various Requests to Charge from Mr. Agan, which embodied his theory that the prohibition in the Georgia Bribery Statute, if it was to be constitutionally applied under the First Amendment to *elected* officials, must be charged so that the jury understands that officials holding elective office are *entitled* to receive and use private contributions for campaign purposes, even though they may have been given "to encourage or *influence*" the official in the performance of his duties.

Mr. Agan's rejected Requests to Charge No's 3 through 8 (*see* Appendix K at App. 136) embodied a coherent defense based on federal constitutional theory and various supportive state statutes referenced in the Requests to Charge. For instance, Mr. Agan's Request to Charge No. 4 stated: "A campaign contribution is a payment which can reasonably be construed to encourage or influence a public officer holding elected office."[1]

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[1] Request to Charge No. 4 was based on the Georgia Ethics in Government Act, which makes "campaign contributions" received by candidates for local office reportable at regular intervals, O.C.G.A. §21-5-34(a)(3) & (4), and goes on to define reportable "campaign contributions" to include (*inter alia*) payments which "can reasonably be construed as a campaign contribution designed to encourage or influence a . . . public officer holding elective office." O.C.G.A. §21-5-3(6) (emphasis added).

Mr. Agan contended that under the First Amendment there can be acceptable "influencing" campaign contributions, especially in light of the socio-political fact of modern life that it is commonly accepted practice in the era of PAC's for campaign contributions to be made and accepted under circumstances where the amount and source of the contribution are intended to reflect the size of the interested constituency and to favorably influence the recipient at least to the extent of giving the contributors and their views so-called "access."

In effect, Mr. Agan was asking the trial court to give the jury a prophylactic charge to the effect that the mere chronological coincidence between a large campaign contribution and lobbying by the contributor on a pending matter before the recipient (hereinafter, "Chronologically Coincident Contribution") and the resulting inference that the contributor intended to "influence" the recipient at least to the extent of gaining access for a hearing, standing alone, would *not* be sufficient to convict on bribery.

Mr. Agan argued that the inevitable degree of perceived "influence" from a large Chronologically Coincident Contribution cannot be deemed part of the core of constitutionally proscribable conduct that the Bribery Statute prohibits; rather it must be seen as falling within the protected breathing space required by critical First Amendment political and associational freedoms.

As a result, Mr. Agan argued that the trial court had a further duty to instruct the jury on the sort of "something more" factors that the State would need to prove in order

to convert an acceptable or legal "influencing" contribution into a bad or illegal "influencing" contribution.

The trial court rejected Mr. Agan's Requests to Charge.

Throughout Mr. Agan's discussions of the merits of his project with the two County Commissioners he was convicted of bribing, which included a meeting with his engineer, the Commissioners expressed probable opposition to his application. Concerned that they might be part of an Abscam II sting operation, especially given Mr. Agan's ethnic background, the Commissioners had reported Mr. Agan's lobbying efforts to the state authorities from day one.

Nonetheless, when pointedly asked by each Commissioner (for the benefit of hidden S.B.I. video cameras) what he expected in return for the contributions, Mr. Agan strenuously reiterated that he expected nothing beyond the respectful hearing he had already received. To Commissioner Lanier Mr. Agan stated:

> Nothing, not a thing, that's one thing I want to make clear, nothing, because I appreciate what you have done for me so far previously. . . .

In response to Commissioner Fletcher's statement that the campaign contributions were "unusual" and made him "feel funny" because he falsely claimed he had never before received contributions from someone with a matter pending before the Commission, Mr. Agan averred:

> Well, it's not supposed to – well, I don't want you to be under pressure. . . . I'm not asking for anything except I will assure you, the way I feel,

> you will be doing [a] service to the county because [t]here's the tax base; and the proposed use for it will be . . . enhancing, not only will I be working with the Shallowford Hospital . . . it will be very close to it. . . . We [*i.e.*, the Turkish-American community] do appreciate your time and effort and understanding.

Yet the actual charge to the jury failed to grapple in any direct or meaningful way with the vital public issue of the precise legal interrelationship – or permissible boundary line – between (i) campaign contributions and lobbying efforts and (ii) bribes.

What the trial court did do was grudgingly concede that a campaign contribution could have *only one* valid purpose under Georgia law in this situation, namely, that of "influencing the nomination for election or election of a person for office." *See* Appendix J at App. 132.

The clear implication, therefore, was that if a campaign contribution was also made with the intent of influencing access, it fell squarely within the prohibition of the bribery statute.

And what specific criminal intent did the trial court require the jury to find? It charged that it is merely the intent "to commit the act which is prohibited by a statute," and this intent may "be inferred when it is *the natural and necessary consequence of an act*," – or "the natural and the probable consequenc[e] of his act." App. 17-19, 134 & 135.

Thus, the trial court's charge sealed Mr. Agan's fate by making the verdict a mini-plebiscite on the apparent impropriety of the widespread practice of DeKalb County

developers making large campaign contributions to the DeKalb County Commissioners who continually rule on projects of direct interest to their political patrons. The jury was set free to convict Mr. Agan on the basis of the apparently widespread popular belief in DeKalb County (as reflected in trial court's own sentencing remarks) that any substantial campaign contribution made directly to a County Commissioner, which is made while a zoning application by the contributor is pending, has the "natural and probable consequence" "of influencing him in the performance of a[n official] act" – which was the only intent necessary under the trial court's instructions to convict Mr. Agan.

In *Agan I* Mr. Agan attacked his 1989 conviction under the Georgia bribery statute (the "Statute"), O.C.G.A. Section 16-10-2(a)(1), on the basis that the Statute was unconstitutionally vague and overbroad as applied to his case – trenching on his core First Amendment rights to associate, petition or lobby, and make campaign contributions in the political arena.

Specifically, he argued that the line between "acceptable" and "bad" *influencing* campaign contributions under the Bribery Statute, as charged by the trial judge, was unconstitutionally vague under the First Amendment – with the result that it would chill protected First Amendment activity and give too much prosecutorial discretion to law enforcement officers, with the attendant dangers of arbitrary and discriminatory enforcement, which is especially intolerable in the area of First Amendment rights. *Grayned v. Rockford*, 408 U.S. 104, 108-09, 92 S.Ct. 2294 (1972); *Kolender v. Lawson*, 461 U.S. 352, 358, 103 S.Ct. 1855 (1983), *quoting Smith v. Goquen*, 415 U.S. 506,

574-75, 94 S.Ct. 1242 (1974). *See also Buckley v. Valeo*, 424 U.S. 1, 41, 96 S.Ct. 630 (1976).

Sitting *en banc* in *Agan I*, the Georgia Court of Appeals agreed. Reversing Mr. Agan's conviction, it ruled that the trial court's charge to the jury was so "incomplete and misleading" as to be reversible error since the purpose of many legitimate campaign contributions, as highlighted by Georgia's own Ethics in Government Act, is unclear and can just as reasonably be construed to be that of influencing the incumbent's vote rather than his reelection prospects.

In effect, it held Mr. Agan had a constitutional right to be convicted based on a charge that precluded his conviction on the simple basis that he made large Chronologically Coincident Contributions, though it did so by giving the Georgia Bribery Statute (*see* Appendix P at App. 159) a saving construction: interpreting it *in pari materia* with a portion of the Georgia Ethics in Government Act (*see* Appendix T at App. 166).

Hence the case was remanded for retrial based on a correct charge that would address the "something more" factors needed to convert an acceptable "influencing" contribution into an illegal bribe. But Mr. Agan never received the benefit of that charge.

The State petitioned the Georgia Supreme Court for a Writ of Certiorari in April of 1989. Invoking First Amendment terminology itself, the State claimed that the common sense proposition that the Agan jury should be charged that some "influencing" campaign contributions may be valid "would have a chilling effect on the State's

ability to control the corruption of or attempts at corruption of public officials":

> Insisting that a trial court advise juries in a bribery case that campaign contributions may be made for the purpose of influencing public officials is tantamount to directing a verdict in favor of defendants like those in the instant case.

On or about June 27, 1989, Attorney General Michael J. Bowers filed an Amicus Curiae brief on behalf of the State of Georgia. The Attorney General strenuously argued that Georgia General Assembly, in passing the Ethics in Government Act and requiring the disclosure of campaign contributions, could not have intended to immunize those contributions from bribery prosecution under O.C.G.A. §16-10-2(a). The Attorney General argued that the Court of Appeals' decision would immunize *all* Chronologically Coincident Contributions; whereas, in reality, as indicated by its decision not to free Mr. Agan, the Court of Appeals merely remanded the Agan case to require that the trial court intelligently instruct the jury on what "something more" factors would be needed to convert an otherwise valid "influencing" campaign contribution into a bribe. As indicated by the remand, such "something more" factors were arguably present in the Agan case.

But in the absence of a valid charge to the jury on the necessity for the State to prove the existence of "something more" factors showing a corrupt intent to influence, Mr. Agan's conviction had to be reversed *whether or not* a

properly-instructed jury could have found that the requisite "something more" factors were present, based on the facts at hand.[2]

The Georgia Supreme Court affirmed the trial court's charge and the jury verdict thereon, but it directed the trial court to conduct an evidentiary hearing on the issue of selective prosecution.

The decision in *Agan II* sent shock waves across the political landscape in Georgia.

In the aftermath of *Agan II*, Attorney General Bowers observed that *all* PAC contributions may be illegal under Georgia's Bribery Statute since their manifest purpose is to influence legislation. (*The Atlanta Constitution* [6/23/91], p. D-10.) Declining to speculate whether or where a principled line could be drawn in making the decision to prosecute, the Attorney General went ahead to equate "a free lunch" to bribery when "chronologically coincident" to lobbying activities. (*The Atlanta Constitution* [3/16/91], p. A-12). Again, the same article emphasized that while the Attorney General said he would "probably" not prosecute such a "free lunch" case, "he decline[d] to say where he draws the line." *Id.*

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[2] "It may be that the jury found that none of the payments was a campaign contribution, but it is mere speculation that the jury convicted on this basis rather than on the impermissible basis that even though the first payment was such a contribution, McCormick's receipt of it was a violation of the Hobbs Act." *McCormick v. U.S.*, 500 U.S. 257, 111 S.Ct. 1807, 1817 (1991). *Accord*, L.H. Tribe, *American Constitutional Law*, p. 1028, n. 20 (2d Ed. 1988).

Much outcry arose over the potential for prosecutorial abuse under the Mere Chronological Coincidence Rule for Bribery prosecutions solemnly endorsed by the Georgia Supreme Court in *Agan II* at the request of Attorney General Bowers and the District Attorney. It led State Senator Dawkins to conclude that the Attorney General's open-ended interpretation of the Bribery Statute had rendered the law a "piece of junk":

> [As interpreted by Bowers,] the law is so broad that it could be abused by any prosecutor who wants to destroy a political enemy, Mr. Dawkins said.

(*The Atlanta Constitution* [3/14/92], p. B-3).

Perhaps not coincidentally, at the time of Mr. Agan's conviction and the decision in *Agan II*, "lobbying" in Georgia was a crime by virtue of O.C.G.A. §28-7-1. *See* Appendix R at App. 163. But illegal lobbying had been construed to pertain to efforts to ply a legislator with favors, rather than honest attempts to persuade him or her to adopt a specific point of view in the exercise of his independent judgment. *See Peacock v. Georgia Municipal Ass'n*, 247 Ga. 740, 279 S.E.2d 434 (1981). That enlightened distinction might have suggested one "something more" factor that would have benefitted Mr. Agan, since his videotaped discussions with the two Commissioners were devoted to the merits of his project.

After the moralistic holding by the Georgia Supreme Court in *Agan II* that "a bribe is a bribe is a bribe," state politicians acted promptly to protect themselves and lobbyists from any such literalistic application of the Bribery Statute and the Lobbying Statute.

The Bribery Statute was amended to protect legislators against extortion charges based on a "free lunch." O.C.G.A. §16-10-2(a)(2). *See* Appendix P at App. 159.

The Lobbying Statute was repealed; and lobbying was legalized and regulated under a new section of the Ethics in Government Act. *See* Appendix S at App. 164. In the process, legitimate reportable lobbying "expenditures" were defined to include "anything of value made for the purpose of *influencing* the actions of any public officer or employee[!]" O.C.G.A. §21-5-70(1)(A) (emphasis added).

For Mr. Agan the irony was bitter. Having won a historic victory in *Agan II* and gotten the Georgia Supreme Court to adopt the Mere Chronological Coincidence Rule so as to salvage a defective jury charge, the District Attorney changed his tune. Faced with a political backlash and the need to defend against Mr. Agan's selective prosecution challenge, the District Attorney decided that mere chronological coincidence was unimportant. He cynically told the Georgia courts that further political bribery prosecutions in Georgia are impossible without the active cooperation of the public officials involved.

For the first time, as argued in Mr. Agan's previous Petition for Certiorari to this Court in Case No. 92-1903, the District Attorney essentially made up a belated list of "something more" that supposedly justified his decision not to prosecute anyone else. Unfortunately, the Georgia Court of Appeals in *Agan III, supra,* accepted the District Attorney's litany of freshly minted "something more" factors at face value:

> When all these factors coalesce, appellant's situation becomes of a different category than the situations [of mere chronological coincidence] attempted to be shown at the hearing. We find no evidence of anyone else crossing *the line of illegality* as did appellant.

See Appendix M at App. 140.

But if such "something more" factors existed, that is all the more reason that the jury should have been instructed as to their potential significance in drawing the "line of illegality," since Mr. Agan was entitled *not* to be convicted on the basis of making large Chronologically Coincident Contributions alone.

Under Section III.B. of its Opinion, the Eleventh Circuit addressed Mr. Agan's challenge to the adequacy of the trial court's jury charge on bribery. Quoting from the text of the indictment, which the trial court read to the jury prior to instructing it on the applicable law and which the court included in a supplemental charge to the jury, the Eleventh Circuit found that the indictment and the supplemental charge both mentioned the "specific intent" required under Georgia's law of bribery as applied to the instant case: namely, that the jury find that Mr. Agan had the specific purpose in making his campaign contributions "of influencing the commissioners' decisions on the zoning variance request."

Even though the Eleventh Circuit conceded in Section III.A.1. that the Georgia statute does not specify that bribery requires a "corrupt" intent, the Eleventh Circuit found that such a requirement has been imported into the statute by a long line of Georgia court cases, which define

"corrupt" intent as "an intent to influence the state officer's official conduct on a particular matter, instead of generally."

Accordingly, having found that the trial court adequately conveyed to the jury the notion that bribery under Georgia law is a "specific intent crime," which required them to find that the so-called "campaign contributions" in question had been made "with the purpose of influencing [the Commissioner] in performance of an act relating to the functions of his office, to-wit: a vote on an application for a building height variance," the Eleventh Circuit went on to quote extensively from the trial court's charge on how the requisite "specific intent" to bribe could be proven.

It is at this point that the Eleventh Circuit went astray.

The Eleventh Circuit quotes without comment the following language from the trial court's charge:

> Intent may be inferred from the proven circumstances or by acts and conduct or it may, in your discretion, be inferred when it is the natural and necessary consequence of an act. . . .
>
> Criminal intent does not mean an intent to violate the law or to violate any particular criminal statute. Criminal intent means simply to intend to commit the act which is prohibited by a statute. Defendants' ignorance of the fact that they were violating a law does not relieve them of criminal intent, if they intended to do the act which the legislature by law has prohibited.
>
> . . .

> Now, you may infer in this case, if you wish to do so, that the acts of a person of sound mind and discretion are the product of his will. ***You may also infer, if you wish to do so, that a person of sound mind and discretion intends the natural and probable consequences of his act.*** [Emphasis added.]
>
> Whether you make any such inference or inferences in this case is a matter solely with[in] the discretion of the jury . . . .
>
> . . .
>
> . . . A campaign contribution means a gift, an advance or deposit of money or anything of value, conveyed or transferred, for the purpose of influencing the nomination for election or election of any person for office.
>
> . . .
>
> In this regard, and in light of the instructions I have given you earlier, I will tell you that it is not the use to which the money may be put, but it is the purpose for which the money was paid that controls.

Although conceding that the charge was "less than perfect" and "could have been more precise," the Eleventh Circuit then concluded *without further analysis* that the instructions adequately "drew the line between legal and illegal intent with regard to donating money to officials" so as to protect Mr. Agan's rights under the Due Process Clause and the Fourteenth Amendment.

The Eleventh Circuit ran out of analytical energy at the precise point that it had framed the key constitutional issue in this case. Could the jury be told, consistent with

the Due Process/First Amendment/Equal Protection strictures of the Fourteenth Amendment, that it was free to infer the corrupt intent to bribe public officials on the basis of the fact that large Chronologically Coincident Contributions have the "natural and probable" consequence of influencing their recipients in the future performance of official acts of benefit to the donor, including voting.

Mr. Agan concedes that the First Amendment "does not imply an explicit *quid pro quo* element into every state bribery offense" and hence does not require "an explicit quid pro quo instruction." *See United States v. Jackson*, 72 F.3d 1370 (9th Cir. 1995).

As indicated by previous observations by this Court, however, campaign contributions are clearly a source of "real or imagined coercive influence" over the recipients, *Búckley v. Valeo*, 424 U.S. 1, 25, 96 S.Ct. 630, 638 (1976). *See also McCormick v. U.S.*, 500 U.S. 257, 111 S.Ct. 1807, 1816 (1991). *Cf. United States v. Brewster*, 506 F.2d 62, 81 & n.1. (D.C.Cir. 1974). That fact was underscored by the decision of the Georgia Court of Appeals in *Agan I* (later reversed) that the trial court on retrial must give Mr. Agan's pretermitted Charge No. 4:

> A campaign contribution is a payment which *can* reasonably be construed to encourage or influence a public officer holding elected office.

As indicated in footnote 1, *supra*, that common sense proposition that any large Chronologically Coincident Contribution may be seen as having the "natural and probable" consequence of "influencing" the recipient was arguably reflected in the language of that portion of the

Georgia Ethics in Government Act that defined what constituted a reportable "campaign contribution." O.C.G.A. §21-5-3(6). *See* Appendix T at App. 166. (It is definitely reflected in the post-*Agan II* statute that legalized lobbying, but that statute is inapplicable to individuals lobbying for themselves. *See* O.C.G.A. §21-5-71(i)(1), Appendix S, at App. 165.)

Again, in response to Mr. Agan's federal constitutional claims the Georgia Court of Appeals gave the ancient Bribery Statute a saving construction by reading it *in pari materia* with the modern Ethics in Government Act. Vindicating old-fashioned morality, the Georgia Supreme Court found that there was no basis in logic for the conclusion that a campaign contribution cannot be a bribe just because it must be reported by its recipient. The Georgia Supreme Court failed to consider that the saving construction by the Court of Appeals was mandated, not by logic, but by the First Amendment.

In *United States v. Jackson, supra,* the Ninth Circuit properly gave Jackson's extreme First Amendment argument the back of its hand. It ruled that the Fourteenth Amendment does not require that the States adopt the same constitutional common law rule as the federal courts, *i.e.,* the *Quid Pro Quo* Rule; but in the alternative the States must adopt a set of "something more" factors to guide juries in drawing the line between acceptable "influencing" contributions and bribes. Accordingly, the Ninth Circuit spent *many* pages wrestling with the related due process and vagueness issues.

In short, despite finding that the First Amendment does not imply an explicit *quid pro quo* element into every

state bribery offense, 72 F.3d at 1376, the Ninth Circuit in *Jackson* still carefully considered the jury instructions given by the court and those rejected by the court to see whether or not the instructions actually given "adequately distinguish[ed] bribery from legal [First Amendment] activity," such as making campaign contributions and lobbying. 72 F.3d at 1379 *et seq.*

Likewise, in *Agan I* the Georgia Court of Appeals insisted at a minimum that the trial court on remand give Mr. Agan's Requests to Charges Nos. 2, 3, 4, & 8, after adjusting them to the facts of the case. *Agan I, supra,* 380 S.E.2d at 762-63.

The defendant in *Jackson* did emphasize the *quid pro quo* element in his facial attack on the California statute. That was so because his "as applied" challenge – to the effect that legitimate First Amendment campaign contributions or lobbying efforts on his part had been unfairly criminalized by virtue of the vague statute – ran afoul of certain wire tap recordings, which included a "remarkably frank recognition" by Jackson and the man he bribed of their crimes, so that the Ninth Circuit found that the jury was free to "take Jackson at his word" and not believe him when he said he had his fingers crossed. 72 F.3d at 1381 & 1386.

By contrast, this case presents the realistic possibility that Mr. Agan should be taken at his word, since the wire taps in this case revealed that he told the two County Commissioners in question that he was engaged in legitimate campaign contribution/lobbying activity in that he did not want them to be under any impermissible obligation, that he expressly was not seeking any sort of *quid*

pro quo, and that he wanted to persuade them in the exercise of their independent judgment. But the charge to the jury prevented them from taking Mr. Agan at his word!

In *McCormick v. United States*, 500 U.S. 257, 111 S.Ct. 1807 (1991), this Court reversed a decision by the Fourth Circuit under the Hobbs Act to the effect that extortion by a politician could be proved under the Hobbs Act in a "campaign contribution" context even without the proof of the receipt of a *quid pro quo*.

By contrast, the Fourth Circuit had created seven "something more" factors that it employed on appeal to distinguish between a legitimate and an illegitimate campaign contribution. This Court disagreed with the Fourth Circuit that an unfavorable determination on *all* of the factors would necessarily render a campaign contribution illegal under the Hobbs Act, noting as follows:

> *Whatever ethical considerations and appearances may indicate*, to hold that legislators commit the federal crime of extortion when they act for the benefit of constituents or support legislation furthering the interests of some of their constituents, shortly before or after campaign contributions are solicited and received from those beneficiaries, is an unrealistic assessment of what Congress could have meant by making it a crime to obtain property from another, with his consent, under cover of official right. To hold otherwise would open to prosecution not only conduct that has long been thought to be well within the law, but also conduct that in a very real sense is unavoidable so long as election campaigns are financed by private contributions

> or expenditures, as they have been since the beginning of the nation.

500 U.S. at 272-73, 111 S.Ct. at 1816 (emphasis added).

Despite finding that the Hobbs Act requires an express *quid pro quo*, this Court observed that while the Court of Appeals identified seven "something more" factors that would distinguish legitimate and illegitimate campaign contributions and found those factors present, the jury itself was not instructed as to what those factors were. Instead, the Fourth Circuit itself determined that there was sufficient evidence to satisfy its seven criteria. 500 U.S. at 269, 111 S.Ct. at 1814-15. (For the seven factors identified by the Court of Appeals, *see* 500 U.S. at 269 n. 7, 111 S.Ct. at 1814 n. 7.)

Accordingly, in *McCormick* the Supreme Court rejected the government's final contention that a properly-instructed jury in that case had found that the payments at issue were not campaign contributions at all and that the evidence amply supported that finding:

> The instructions given here are not a model of clarity, and it is true that the trial court instructed that the receipt of voluntary campaign contributions did not violate the Hobbs Act. But under the instructions a contribution was not "voluntary" if given with any expectation of benefit; and as we read the instructions, taken as a whole, the jury was told that it could find McCormick guilty of extortion if any of the payments, even though a campaign contribution, was made by the doctors with the expectation that McCormick's official action would be influenced for their benefit and if McCormick knew that the payment was made with that

> expectation. It may be that the jury found that none of the payments was a campaign contribution, but it is mere speculation that the jury convicted on this basis rather than on the impermissible basis that even though the first payment was such a contribution, McCormick's receipt of it was a violation of the Hobbs Act.

500 U.S. at 274, 111 S.Ct. at 1817.

Of course, since the Georgia Supreme Court in *Agan II* reversed the Court of Appeals in *Agan I* and revoked its invitation to the trial judge to give the Georgia Bribery Statute a narrowing and saving construction through (i) a prophylactic charge on the inevitable and acceptable "influencing" effect of large Chronologically Coincident Contributions and (ii) the articulation of the sort of "something more" factors that must be proven to distinguish a legal "influencing" contribution from a bribe, Mr. Agan's conviction must be reversed because the Georgia Bribery Statute (as definitively interpreted by the Georgia Supreme Court in *Agan II*) is unconstitutionally overbroad – and he cannot be retried.

REASONS FOR GRANTING THE WRIT

Mr. Agan has exhausted all other avenues of relief.

Many states have similarly worded bribery statutes that were manifestly designed for a pre-PAC horse and buggy era. More particularly, they were not designed to be applied to elected officials at all, especially those with broad discretionary powers and a perceived duty to be

responsive to the legitimate political grievances of their constitiuents.

Unfortunately, as numerous commentators have noted, once old bribery statutes like Georgia's are applied literally to elected officials, there is no basis for distinguishing between a bribe and a protected campaign contribution other than the utterly vague notion of "corrupt" intent to influence, thus clearly implicating First Amendment vagueness/overbreath concerns, especially in light of *Buckley v. Valeo, supra. See, e.g.*, Note, *Campaign Contributions and Federal Bribery Law*, 92 Harv. L. Rev. 451, 453-55 (1978). Once it is conceded that a campaign contribution can be a "thing of value" for bribery purposes, "the result is that the potential sweep of the bribery statutes is enormous." Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 52 U.C.L.A. L. Rev. 784, 809 (1985) ("Political Bribery").

To avoid that standardless sweep, federal courts have adopted the "bright line" of the Quid Pro Quo Rule. *Accord, People v. Brandstetter*, 103 Ill.App.3d 259, 430 N.E.2d 731, 736 (1982), *cert. denied*, 459 U.S. 988, 103 S.Ct. 342 (1982).

This Court in *Buckley* gave the green light to certain types of restrictions on campaign contributions. Indeed, *Buckley* upheld prophylactic limits on the amount of campaign contributions against First Amendment attack as being one of the least restrictive means of curbing the appearance and reality of political corruption, based on this Court's stated belief that bribery laws "deal with only the most blatant and specific attempts of those with money to influence governmental action." 424 U.S. at 28.

Unfortunately, the problem is that all too often legislatures have not seen fit to accept this Court's invitation to adopt meaningful campaign contribution limits or regulations.

At the time of Mr. Agan's campaign contributions Georgia law placed no limit on the amount of annual contributions that could be made to an elected local official! Accordingly, the local zoning process was awash in a sea of obligatory contributions by "good old boys." As a Turkish-American stranger to the process, Mr. Agan was made a convenient scapegoat to reassure a dubious public that the system was self-policing. In the aftermath of *Agan II*, however, a $1,000 limit was imposed on contributions to local officials in non-election years and a $2,000 limit in election years. O.C.G.A. §21-5-41(a.1). *See* Appendix Q at App. 162.

The problem is that there are increasing pressures on the elected local judiciary not to wait for the legislature to act in a thoughtful and carefully-tailored way and not to be perceived as condoning political corruption in the meantime.

Leaving aside the First Amendment, Professor Lowenstein has argued that there is no reason in *logic* why a campaign contribution designed to gain "access" to the ear of a legislator in order to lay before him or her the merits of the contributor's political grievance should not be deemed by a jury a corrupt attempt to influence an "official action":

> [A] legislator's time is so limited that the decision to listen to one person's argument and

> information on an issue and not another's is itself an official action.

Lowenstein, *Political Bribery, supra,* at 828.

Professor Lowenstein recommends that the nation's antique bribery statutes be dusted off and applied with extreme literalness to all "influencing" campaign contributions – a recommendation that the Georgia Supreme Court unflinchingly adopted.

But the fact that "influencing" contributions for "access" purposes are so prevasive and accepted is not irrelevant to the First Amendment claims here. If "[i]t is true that under the present system of campaign finance, many groups have no choice but to make . . . contributions that are intended to influence official conduct," Lowenstein, *Political Bribery, supra,* at 848, then such contributions may be an essential *de facto* part of the exercise of one's lobbying or petition rights. *Cf. Eastern R.R. Presidents' Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 138-39, 81 S.Ct. 523, 529 (1961). As one observer has noted, "ninety-nine percent of lobbying in Washington, D.C. . . . is now fund-raising." E. Drew, *Politics and Money, The Road to Corruption* 58 (1983). Mr. Agan himself was trying to create an *ad hoc* Turkish-American PAC.

The need for this Court to address this issue was underscored by the unapologetic account by Roger Tamraz before the Senate Governmental Affairs Committee on September 18, 1997, of why he donated $300,000.00 to the DNC – and the fact that his candor was well received. Mr. Tamraz wanted to gain high level political access to try to influence U.S. policy towards a Caspian Sea pipeline project. That is what all his competitors do. He

wanted a "equal playing field." "It's the only reason [to make large contributions] – to get access."

If there is a problem, the real solution should be to adopt "soft money" campaign finance reform a la the McCain-Feingold Bill and spending limits at the state level – and/or to refine our bribery statutes – and/or to enforce existing campaign finance reform laws. The solution is *not* to allow the threat of discriminatory prosecutions at the state level under broadly-worded bribery statutes. State officials should not be allowed to pretend that antique bribery statutes are anything but a blunt and constitutionally defective tool in the fight against campaign corruption. Allowing that illusion to persist will only delay the advent of meaningful campaign finance reform.

CONCLUSION

FOR THE REASONS SET FORTH ABOVE A WRIT OF CERTIORARI SHOULD ISSUE TO REVIEW THE JUDGMENT AND OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT IN THIS MATTER.

DATED: January 29, 1998.

Respectfully submitted,

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APPENDIX A

119 F.3d 1538

Ramsey AGAN, Petitioner-Appellant,

v.

James VAUGHN, Respondent-Appellee.

No. 96-8085.
United States Court of Appeals,
Eleventh Circuit.
Aug. 27, 1997.

Appeal from the United States District Court for the Northern District of Georgia.

Before ANDERSON and CARNES, Circuit Judges, and STROM,* Senior District Judge.

CARNES, Circuit Judge:

Ramsey Agan was convicted on three counts of bribery in the Superior Court of DeKalb County, Georgia. After exhausting his state remedies, Agan filed in federal district court a 28 U.S.C. § 2254 petition for a writ of habeas corpus. This appeal arises from the district court's denial of Agan's petition.

I. BACKGROUND

Because a detailed recitation of the facts can be found in the Georgia Court of Appeals opinion on direct appeal, *see Agan v. State*, 191 Ga.App. 92, 380 S.E.2d 757, 759-60 (1989), *aff'd in part, rev'd in part*, 259 Ga. 541, 384 S.E.2d

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* Honorable Lyle E. Strom, Senior U.S. District Judge for the District of Nebraska, sitting by designation.

863 (1989), *and cert. denied*, 494 U.S. 1057, 110 S.Ct. 1526, 108 L.Ed.2d 765 (1990), we will summarize them only briefly here. Agan, the Honorary Turkish Consul in Atlanta, owned a piece of property in DeKalb County, Georgia, upon which he wanted to construct a hotel. In order to construct the hotel, he needed a building height variance from the DeKalb County Commission. The Commission rejected the variance application twice. In conjunction with his third request, Agan approached and met separately with two individual commissioners in an attempt to persuade them to get the variance application approved. Agan gave one of the commissioners five checks totaling $4,500, each check marked "campaign contribution." He gave the other commissioner a $3,000 check, also marked "campaign contribution." Agan gave the checks to the commissioners over their protests that they were not up for reelection, and over one commissioner's objection that he did not even have a campaign account.

A jury convicted Agan on three counts of violating § 16-10-2(a)(1) of the Georgia Code, which defines the crime of bribery to include offering or giving to a public official any consideration "to which he or she is not entitled with the purpose of influencing him or her in the performance of any act related to the functions of his or her office or employment." On direct appeal, for which Agan had new counsel, the Georgia Court of Appeals reversed Agan's conviction because of a jury instruction, holding that "the trial court's definition of 'entitled,' while not wholly incorrect, was incomplete and misleading in the context of this case and could have misled the

jury to appellant's prejudice." *Agan,* 380 S.E.2d at 762 (citation omitted).

The Georgia Supreme Court reversed that reversal. *See State v. Agan,* 259 Ga. 541, 384 S.E.2d 863 (1989). The Georgia Supreme Court interpreted the Georgia Court of Appeals' holding to mean "in effect, that if money given to an office holder qualifies as a campaign contribution, requiring reporting under the Ethics in Government Act, OCGA § 21-5-1 et seq., then it cannot be a bribe." *Id.* at 866. The Georgia Supreme Court rejected that interpretation of the law and reinstated Agan's conviction, subject to a remand for further proceedings relating to his selective prosecution claim. *See id.* at 868-70. Agan petitioned for a writ of certiorari from the United States Supreme Court, but it was denied. *See Agan v. Georgia,* 494 U.S. 1057, 110 S.Ct. 1526, 108 L.Ed.2d 765 (1990).

On remand, after an evidentiary hearing, the trial court denied Agan's motion to dismiss for selective prosecution. While his post-remand appeal from the denial of his motion to dismiss on selective prosecution grounds was pending, Agan filed an extraordinary motion for a new trial. That motion alleged for the first time that trial counsel had prevented Agan from testifying at his trial and thereby had rendered ineffective assistance. After the trial court held a hearing on the issue, it determined that Agan had waived the claim. Accordingly, the trial court entered an order denying the new trial motion. The Georgia Court of Appeals denied Agan's application for discretionary review of that ruling.

Meanwhile, both the Georgia Court of Appeals and the Georgia Supreme Court affirmed the denial of Agan's

motion to dismiss for selective prosecution, and the U.S. Supreme Court again denied Agan's petition for certiorari. *See Agan v. State*, 203 Ga.App. 363, 417 S.E.2d 156 (1992), *aff'd*, 262 Ga. 783, 426 S.E.2d 552 (1993), *cert. denied*, 510 U.S. 819, 114 S.Ct. 74, 126 L.Ed.2d 43 (1993).

Having exhausted his state remedies, Agan filed a federal habeas petition. In it, Agan claimed that: (1) his conviction violated his First Amendment rights to free association and free speech; (2) the jury charge in his case violated his Fourteenth Amendment right to due process; (3) his conviction was obtained through unconstitutional selective prosecution; and (4) his attorney and the trial court denied him the right to testify, resulting in ineffective assistance of counsel. The district court referred Agan's petition to a magistrate judge, who recommended that the petition be denied. The district court adopted the magistrate judge's recommendation and denied Agan's petition. Agan filed a timely appeal to this Court.

II. STANDARDS OF REVIEW

On appeal, Agan contends that his conviction violates his First Amendment rights to free association and free speech and his Fourteenth Amendment right to due process. We review those purely legal questions *de novo*. *See Redner v. Dean*, 29 F.3d 1495, 1499 (11th Cir.1994) (reviewing First Amendment habeas claim); *McCoy v. Newsome*, 953 F.2d 1252, 1264-65 (11th Cir.1992) (reviewing Fourteenth Amendment due process claim based on inadequate jury charge). Agan also pursues his ineffective assistance of counsel claim, which presents a mixed question of law and fact that we review *de novo*. *See Huynh v.*

King, 95 F.3d 1052, 1056 (11th Cir.1996). The State argues that Agan is barred from raising that claim because of procedural default. Whether Agan is procedurally barred from raising a particular claim is a mixed question of law and fact, which we also review *de novo*. *See Lusk v. Singletary*, 112 F.3d 1103, 1105 (11th Cir.1997) (reviewing district court's determination that petitioner had defaulted issue in state court system) (citation omitted). Agan has abandoned his selective prosecution claim.

III. DISCUSSION

Agan is not entitled to federal habeas relief unless he "is in custody in violation of the Constitution or laws or treaties of the United States."[1] 28 U.S.C.A. § 2254(a) (West 1994).

A. FIRST AMENDMENT ISSUES

Agan claims that his conviction under Georgia's bribery statute violates the First Amendment. Agan was convicted for violating the following portion of that statute:

> A person commits the offense of bribery when: (1) He or she gives or offers to give to any person acting for or on behalf of the state or any political subdivision thereof, or of any agency of either, any benefit, reward, or consideration to

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[1] Because Agan filed his habeas petition before the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), the new act does not apply to Agan's habeas petition. *See Lindh v. Murphy*, ___ U.S. ___, ___, 117 S.Ct. 2059, 2068, 138 L.Ed.2d 481 (1997).

> which he or she is not entitled with the purpose of influencing him or her in the performance of any act related to the functions of his or her office or employment. . . .

Ga.Code Ann. § 16-10-2(a) (1996). He challenges the statute's constitutionality on its face and as applied to his conduct.[2]

1. *Facial Attack*

Agan claims that Georgia's bribery statute is overbroad. A statute that may be applied constitutionally to conduct in some cases is nevertheless facially invalid under the First Amendment if it is substantially overbroad, that is, its application would be unconstitutional in a substantial proportion of cases. *See, e.g., Broadrick v. Oklahoma,* 413 U.S. 601, 615, 93 S.Ct. 2908, 2918, 37 L.Ed.2d 830 (1973) ("[W]here conduct and not merely speech is involved . . . the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."); *Clean Up '84 v. Heinrich,* 759 F.2d 1511, 1513 (11th Cir.1985).

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[2] At least where AEDPA does not apply, precedent indicates that a habeas petitioner may bring a facial challenge to the state statute under which he was convicted if that statute threatens conduct protected by the First Amendment, even though the petitioner could have been prosecuted constitutionally under a narrower statute. *See Gooding v. Wilson,* 405 U.S. 518, 520-21, 92 S.Ct. 1103, 1105, 31 L.Ed.2d 408 (1972); *Redner,* 29 F.3d at 1499 (11th Cir.1994). The AEDPA amendments may preclude such facial attacks in habeas proceedings, but that is an issue we need not decide because of AEDPA's inapplicability to this case.

According to Agan, Georgia's bribery statute criminalizes the donation of campaign contributions whenever the donor hopes that the contributions will "influence" a state officer's official actions. Agan asserts that: (1) campaign donors *usually* hope to "influence" the official actions of state officers; (2) there are benign or "good influencing campaign contributions"; and (3) the First Amendment protects the donation of those contributions. He argues that the Georgia statute is unconstitutionally overbroad, because it does not differentiate between good influencing campaign contributions and bad influencing campaign contributions.[3] Agan concedes that if the Georgia bribery statute criminalizes only those contributions that are made with corrupt intent, it is facially valid.

Georgia, unlike many other states, does not include an element of corrupt intent in the text of its bribery statute. *Compare* Ga.Code Ann. § 16-10-2 (1996) *with* Ala.Code § 13A-10-61(a) (1975) ("A person commits the crime of bribery if (1) He offers . . . any thing of value upon a public servant with the intent that the public servant's vote, opinion, judgment, exercise of discretion or other action in his official capacity will thereby be *corruptly influenced*. . . . ") (emphasis added); Ariz.Rev.Stat. Ann. § 13-2602 (West 1989) ("A person commits bribery of a public servant or party officer if *with corrupt intent* . . . [s]uch person offers, confers or agrees to confer any benefit upon a public servant or party officer

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[3] Agan does not contend in this appeal that the First Amendment requires the Georgia bribery statute to contain a quid pro quo element, although he made that argument on direct appeal in the state courts.

with the intent to influence the public servant's or party officer's vote, opinion, judgment, exercise of discretion or other action in his official capacity as a public servant or party officer.") (emphasis added); Fla. Stat. Ann. § 838.015(1) (West 1994) (" 'Bribery' means *corruptly* to give, offer, or promise to any public servant . . . any pecuniary or other benefit with an intent or purpose to influence the performance of any act or omission which the person believes to be . . . within the official discretion of a public servant. . . . ") (emphasis added); Mich. Comp. Laws Ann. § 750.117 (West 1991) ("Any person who shall *corruptly* give, offer or promise to any public officer . . . any gift, gratuity, money, property or other valuable thing, the intent or purpose of which is to influence the act, vote, opinion, decision or judgment of such public officer . . . shall be guilty of a felony.") (emphasis added); Ohio Rev.Code Ann. § 2921.02(A) (Banks-Baldwin 1996) ("No person, with purpose to *corrupt* a public servant or party official . . . shall promise, offer, or give any valuable thing or valuable benefit.") (emphasis added); Okla. Stat. tit. 21, § 381 (1997) ("Whoever *corruptly* gives, offers, or promises to any . . . public officer . . . any gift or gratuity whatever, with intent to influence his act, vote, opinion, decision, or judgment on any matter, question, cause, or proceeding which then may be pending, or may by law come or be brought before him in his official capacity . . . shall be punished by imprisonment. . . . ") (emphasis added); R.I. Pub. Laws § 11-7-4(a) (1996) ("No person shall *corruptly* give or offer any gift or valuable consideration to any person in public or private employ, or any public official as an inducement or reward for doing or forebearing to do, or for having

done or forborne to do, any act. . . . ") (emphasis added); S.C.Code Ann. § 16-9-210 (Law Co-op.1976) ("Whoever *corruptly* gives, offers or promises to any . . . officer, after his election or appointment . . . any gift or gratuity whatever, with intent to influence his act, vote, opinion, decision or judgment on any matter, question, cause or proceeding which may be pending or may by law come or be brought before him in his official capacity, shall be punished by imprisonment. . . . ") (emphasis added).

However, Georgia decisions have read an element of corrupt intent into its bribery statute. In *King v. State*, 246 Ga. 386, 271 S.E.2d 630 (1980), the Georgia Supreme Court explained that the bribery statute requires proof that the defendant had the purpose or intent of *corruptly inducing* the government official to take a given action. *See id.* at 632. Likewise, in *Ingram v. State*, 97 Ga.App. 468, 103 S.E.2d 666 (1958), the Georgia Court of Appeals held that "[t]he essential elements of the offense [of bribery] are . . . the offer or gift, *the purpose to corruptly influence*, and the official status of the offeree." *Id.* at 670 (construing former Ga. Code §§ 26-4101 & 26-4102 (1933) (emphasis added). Significantly, in Agan's appeal to the Georgia Supreme Court, the court cited the *King* decision for the proposition that bribery has a well-known meaning, which is the "act of influencing the action of another by *corrupt inducement*." *See State v. Agan*, 259 Ga. 541, 384 S.E.2d 863, 867 (1989) (emphasis added). Contrary to what Agan suggests, Georgia's bribery statute proscribes only those campaign donations that are made with corrupt intent.

We have not been cited to a Georgia decision expressly defining "corrupt" or "corruptly," but the term

"corruptly" is generally used to mean "import[ing] a wrongful design to acquire some pecuniary or other advantage." *Black's Law Dictionary* 345 (6th ed.1990); *see also United States v. Jackson,* 72 F.3d 1370, 1375 (9th Cir.1995) (upholding bribery conviction under California law, which defines "corruptly" as "import[ing] a wrongful design to acquire or cause some pecuniary or other advantage to the person guilty of the act or omission referred to, or to some other person"), *cert. denied,* ___ U.S. ___, 116 S.Ct. 1546, 134 L.Ed.2d 649 (1996); *State v. Walker,* 185 Ariz. 228, 914 P.2d 1320, 1334 (Ct.App.1995) (defining "corruptly" for purpose of bribery statute as "import[ing] a wrongful design to acquire or cause some pecuniary or other advantage to the person guilty of the act or omission referred to, or to some other person"); *State v. Hair,* 114 N.C.App. 464, 442 S.E.2d 163, 165 (1994) (explaining in bribery case that "[a] corrupt intent means 'a wrongful design to acquire some pecuniary profit or other advantage' ") (citation omitted).

The State of Georgia contends that, with regard to the bribery statute, a corrupt intent means an intent to influence the state officer's official conduct on a particular matter, instead of generally. The Georgia bribery cases support that contention. *See, e.g., Perry v. State,* 118 Ga.App. 22, 162 S.E.2d 466, 467-68 (1968) ("Bribery may consist in an offer to give money or to make any promise for the payment, delivery, or alienation of any money, to any officer of this State, in order to influence his behavior in any matter pending before him."); *see also Lee v. State,* 204 Ga.App. 283, 418 S.E.2d 809, 811 (1992) (upholding bribery conviction where there was sufficient evidence that defendant offered police officer money to participate

in drug distribution activities); *Jennings v. State*, 81 Ga.App. 823, 60 S.E.2d 183, 183 (1950) (upholding bribery conviction where there was sufficient evidence that defendant had offered arresting officer fifty dollars not to prosecute him for possession of unstamped whiskey).

Ignoring Georgia's long line of cases requiring corrupt intent, Agan argues that Georgia courts will find the bribery statute satisfied by evidence that is entirely consistent with an intent to "influence" an official in "good" ways, such as by supporting the nomination or election of the official. Agan has cited no cases to support that assertion, and we have found none. Indeed, the Georgia Court of Appeals has reversed a bribery conviction where the evidence supported inferences of both corrupt intent and lawful intent. *See Upton v. State*, 166 Ga.App. 541, 305 S.E.2d 1, 3 (1983) (reversing bribery conviction for city engineer who received payment from city contractor where evidence was consistent with finding that city engineer had received money for work actually done on project). Moreover, in Agan's case, the Georgia Supreme Court concluded that the evidence supported a beyond a reasonable doubt finding that Agan's intent in giving the checks to the commissioners was to influence their votes on the zoning variance request. In reaching that conclusion, the Georgia Supreme Court was careful to distinguish having an unlawful intent from having the lawful intent to influence the nominations or elections of public officials, or the lawful intent to influence public officials through non-monetary persuasion. As that court explained:

> Citizens of Georgia have every right to try to influence their public officers – through petition

> and protest, promises of political support and threats of political reprisal. They do not have, nor have they ever had, the "right" to buy the official act of a public officer. Public officers are not prohibited from receiving *legitimate financial aid in support of nomination or election to public office*. They do not have, nor have they ever had, the "right" to sell the powers of their offices.
>
> *Agan*, 384 S.E.2d at 867 (internal citations omitted).

A facial attack on a statute may not succeed where the statute in question has been interpreted by the state courts in such a way as to make the statute's operation constitutional. *See Broadrick*, 413 U.S. at 613, 93 S.Ct. at 2916. Agan concedes that if the bribery statute has a corrupt intent element, it does not violate the First Amendment. We conclude that Georgia's law of bribery does include as an element corrupt intent. Accordingly, we reject Agan's facial challenge.

2. *As-Applied Challenge*

Agan further claims that, even if the bribery statute is not unconstitutional on its face, it is unconstitutional as applied to his conduct. Because Agan concedes that proof of corrupt intent would make his conviction valid under the First Amendment, his as-applied challenge turns on whether there was sufficient evidence of corrupt intent in Agan's case. As we explained above, in Georgia corrupt intent is shown by evidence of an intent to influence a state officer's official conduct in a particular matter. Thus, if there was evidence introduced at Agan's trial sufficient for a jury to find beyond a reasonable doubt that Agan

offered the county commissioners money with the intent to influence their conduct on his zoning variance request, as distinguished from doing so for the purpose of getting them reelected, Agan's as-applied challenge fails.

We conclude that a jury could find beyond a reasonable doubt that Agan made his "campaign contributions" to the county commissioners with the corrupt intent of purchasing their votes on his variance request. We will not set forth all of the evidence relevant to that issue, because the Georgia Court of Appeals detailed that evidence in the context of discussing Agan's sufficiency-of-the-evidence argument for reversal. *See Agan*, 380 S.E.2d at 759-60. However, we will point out some of the key evidence supporting Agan's conviction. Commissioner Fletcher testified that Agan approached him about his variance request and, in the same conversation, spoke about friends who wanted to support Fletcher's campaign. Fletcher discouraged the idea, explaining to Agan that he was not currently campaigning for reelection. Nevertheless, Agan soon presented Fletcher with checks totaling $3,700 marked "campaign contribution." At that time, Fletcher told Agan he did not have a campaign bank account, but Agan told him to keep the money. At trial, the State also introduced a videotape of a meeting between Agan and Commissioner Robert Lanier concerning the variance request. At that meeting, Agan offered Lanier a $3,000 check marked "campaign contribution," even though Lanier told Agan that he was not up for reelection for three years.

Based on the testimony of Fletcher and the videotape of the meeting with Lanier, a reasonable jury could find

that Agan's intent in making the donations was to influence the commissioners' decisions regarding his zoning variance request, not to support the commissioners' reelection attempts. Because the State provided sufficient evidence of corrupt intent to prove that element, and as Agan concedes, a valid finding of corrupt intent defeats his as-applied challenge, that challenge fails.

B. FOURTEENTH AMENDMENT

Agan challenges the adequacy of the trial court's jury charge on bribery. He claims that the court failed to charge the jury on corrupt intent or otherwise instruct the jury on the vital distinction between corrupt campaign contributions and lawful campaign contributions. Agan argues that as a result the jury could have, and in fact did, convict him of conduct that is not proscribed by Georgia's bribery statute.

As a federal court of appeals, we do not have the final say on what instructions a bribery charge must contain in order to accurately state Georgia law. That is the purview of the Georgia Supreme Court, which already has decided that Agan's jury charge correctly and adequately explained the State's bribery statute. *See Agan*, 384 S.E.2d at 865-67. Our limited role on habeas review, when faced with a challenge to a state law jury charge, is to determine whether any error or omission in the jury charge was so prejudicial as to amount to a violation of due process. *See Carrizales v. Wainwright*, 699 F.2d 1053, 1055 (11th Cir.1983). In making that determination, we do not judge portions of the jury charge, or even the entire

charge, standing alone. A defendant's right to due process is not violated unless an erroneous instruction, when viewed in light of the entire trial, was so misleading as to make the trial unfair. *See Estelle v. McGuire*, 502 U.S. 62, 72, 112 S.Ct. 475, 482, 116 L.Ed.2d 385 (1991); *Jacobs v. Singletary*, 952 F.2d 1282, 1290 (11th Cir.1992).

We conclude that the instructions given to Agan's jury were not so misleading as to violate his right to due process. Prior to instructing the jury on the applicable law, the court read the indictment charging Agan with multiple counts of bribery. The text of the indictment states specifically what elements the jury was obligated to find in order to convict Agan of each count of bribery. The court told the jury:

> The Grand Jury of DeKalb County charge[s] and accuses, in Count 1, [ ] Ramsey Agan with the offense of bribery and they allege, in the County of DeKalb and the State of Georgia, on the 19th day of June, 1987, gave DeKalb County Commissioner John Fletcher, a person acting on behalf of DeKalb County, a political subdivision of the State of Georgia, a consideration to which he was not entitled, to wit: checks in the amount of three thousand, seven hundred dollars, and of the value of three thousand, seven hundred dollars, *with the intent of influencing him in the performance of an act relating to the functions of his office[,] to wit: a vote on an application for building height variance*. . . .
>
> Count 3 charges Ramsey Agan with the offense of bribery, and once again, in DeKalb County, it alleges that on the 6th day of July, 1987, he did give to DeKalb County Commissioner John Fletcher, a person acting on behalf

> of DeKalb County, a political subdivision of the State of Georgia, a consideration to which he was not entitled, to wit: a check in the amount of eight hundred dollars, and of the value of eight hundred dollars, *with the purpose of influencing him in the performance of an act relating to the functions of his office, to wit: a vote on an application for a building height variance.*
>
> Count[ ] 4 charges and accuses Ramsey Agan and Rauf Sarper with the offense of bribery, once again, they alleged that in DeKalb County, on the 21st day of July, 1987, they did give to DeKalb County Commissioner Robert Lanier, a person acting on behalf of DeKalb County, a political subdivision of the State of Georgia, a consideration to which he was not entitled, to wit: a check in the amount of three thousand dollars, of the value of three thousand dollars, *for the purpose of influencing him in the performance of an act relating to the functions of his office, to wit: a vote on an application for a building height variance.*

(emphasis added). Though the indictment does not contain the word "corrupt" or "corruptly," it states repeatedly that an element of the crime alleged is having the purpose or intent to influence the commissioners' decisions on the zoning variance request. Because the indictment repeatedly mentions the specific intent required under Georgia's law of bribery, we doubt that the jury – even before it was charged on the law – would have had the impression that Agan could be convicted of bribery without a finding that he had the purpose of influencing the commissioners' decisions on the zoning variance request.

After reading the indictment, the court instructed the jury on the applicable law. The portions of the court's charge relevant to the intent element were as follows:

> Now, the defendants in this case are charged with a crime against the laws of the State of Georgia. A crime is a violation of a statute in which there is a union and a joint operation of two elements, act and intention.
>
> Intent is an essential element of any crime. Intent must be proved by the State beyond a reasonable doubt. Intent can be shown in many ways, provided you, the jury, believe that it existed from the proven facts before you. Intent may be inferred from the proven circumstances or by acts and conduct or it may, in your discretion, be inferred when it is the natural and necessary consequence of an act.
>
> I will charge you that presence, companionship and conduct, before and after the offense, are circumstances which the jury can consider in considering the question of intent.
>
> Criminal intent does not mean an intent to violate the law or to violate any particular criminal statute. Criminal intent means simply to intend to commit the act which is prohibited by a statute. Defendants' ignorance of the fact that they were violating a law does not relieve them of criminal intent, if they intended to do the act which the legislature by law has prohibited.
>
> No defendant will be presumed to act with criminal intent, but you can fund such intention, or the absence thereof, upon a consideration of the words, the conduct, the demeanor, the motive and the other circumstances connected

with the act for which the defendant is being prosecuted.

Now, you may infer in this case, if you wish to do so, that the acts of a person of sound mind and discretion are the product of his will. You may also infer, if you wish to do so, that a person of sound mind and discretion intends the natural and probable consequences of his act.

Whether you make any such inference or inferences in this case is a matter solely with the discretion of the jury. . . .

As you know, the defendants in this case are charged with the offense of bribery. Let me go over with you the Georgia Law, the definition which will contain the elements that must be proven by the State beyond a reasonable doubt for a conviction as to the kind of bribery. Under Georgia Law a person commits bribery when he gives or offers to give to any person acting for or on behalf of the State or any political subdivision thereof, any benefit, reward or consideration to which he is not entitled, with the purpose of influencing him in the performance of any act related to the function of his office or employment.

Now, the word "entitled" does not have any specific or extraordinary or particular legal terminology or definition. I will charge you the word "entitled" means to give a deed or title to.

I will further charge you that the DeKalb County Board of Commissioners serve DeKalb County and DeKalb County is a political subdivision of the State of Georgia.

Now, there is in Georgia Law an Act which is known as the Ethics in Government Act. This

Act, among other things, discusses campaign contributions. Let me define for you, under the Ethics in Government Act, the definition of a campaign contribution. Now, for the purpose of this case, there are certain other elements of the definition which are not material. It is a rather long definition and it will be very confusing. What I have done is taken the relevant sections, the sections that I think are necessary for you to understand in your consideration of this case: A campaign contribution means a gift, an advance or deposit of money or anything of value, conveyed or transferred, for the purposes of influencing the nomination for election or election of any person for office.

I will further charge you that a campaign contribution, as I have just defined for you, can be made directly to the candidate.

Now, I will further charge you that under Georgia Law campaign contributions can be made for use in future campaigns for elective office.

In this regard, and in light of the instructions I have given you earlier, I will tell you that it is not the use to which the money may be put, but it is the purpose for which the money was paid that controls.

Although less than perfect, the jury charge did focus on the key question before the jury: Agan's intent in giving money to the commissioners. The jury was told that the defendants' guilt depended on "the purpose for which the money was paid." The court clearly stated that it is not illegal to make campaign contributions directly to a candidate for future campaigns, but it is illegal to give

money for the purpose of influencing an official act. Those instructions accurately described Georgia law on intent and drew the distinction between illegal and legal conduct that was necessary to protect Agan's rights.

Admittedly, the jury charge could have been more precise. It appears that at the beginning of deliberations, some members of Agan's jury, though knowing that their task was deciding the intent of Agan and his co-defendant, Rauf Sarper, did not completely understand what constitutes an unlawful intent. During deliberations, the jury submitted a question to the court regarding the question of intent as to Rauf Sarper. That question gave the trial court another opportunity to draw the line between legal and illegal intent with regard to donating money to officials. If nothing else made the issue clear enough for the jury, this additional instruction sufficed:

> [Y]ou wish to know whether the intent element of that is an intent to specifically influence the vote on the height variance. I assume that is your question. Is that correct? All right.
>
> Well, let me recharge you generally on what the law is as to intent. You recall when I charged you on intent I said intent is an essential element of any crime. Intent must be proved by the State beyond a reasonable doubt. Now, intent can be shown in many ways, provided you, the jury, believe that it existed from the proven facts before you and can be inferred from proven circumstances or by acts and conduct or it may be, in your discretion, inferred when it is the natural and necessary consequence of the act.

> Now, criminal intent does not mean the intent to violate the law or to violate any particular criminal statute. Criminal intent means simply to intend to commit the act which is prohibited by the statute. . . .
>
> Now, I will further charge you – you have a copy of the indictment, but I have a spare copy in the Court's file, and this particular act charges the defendant with being involved in giving to DeKalb County Commissioner Fletcher, a person acting on behalf of DeKalb County, a political subdivision, a consideration to which he was not entitled *with the purpose of influencing him in the performance of an act relating to the functions of his office, to wit: a vote on an application for a building height variance.*
>
> Now, under Georgia Law that's known as a specific intent crime. All right. Specific intent crime, they allege in the indictment, that is the purpose for which the defendant gave that money to Commissioner John Fletcher. That's the intent.
>
> So, you will understand that that is the specific intent statute, and the allegations in the indictment on which you have to vote, charges him with *committing these acts with the purpose of influencing Mr. Fletcher in performance of an act relating to the functions of his office, to wit: a vote on an application for a building height variance.*

(emphasis added). That charge explained more clearly than the original instructions had that, in order to find the defendants guilty of bribery, the jury had to find that the defendants had the intent to influence the commissioners on the particular matter of the zoning variance request. We hold that the follow-up charge, combined

with the initial charge and the reading of the indictment, made the jury sufficiently aware of the difference between a lawful campaign donation and a bribe. The court framed the issue of intent well enough to satisfy the due process requirements of the Fourteenth Amendment.

C. INEFFECTIVE ASSISTANCE OF COUNSEL

Agan makes another claim wholly unrelated to his claims regarding the bribery statute. He contends that he is entitled to habeas relief, because he was denied the right to testify at his trial through the actions of his attorney and the trial court. The denial of his right to testify, Agan argues, stemmed from and amounted to ineffective assistance of counsel. The State argues that this claim is barred by procedural default, and that Agan cannot show cause for that default.

1. *Procedural Default*

Agan first raised this issue in his extraordinary motion for a new trial in June 1991. The Georgia trial court held that he had waived the claim as a matter of state law by not asserting it earlier.[4] (Recall that before

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[4] Georgia's general rule for procedural default is as follows:

[A] failure to make timely objection to any alleged error or deficiency or to pursue the same on appeal ordinarily will preclude review by writ of habeas corpus. However, an otherwise valid procedural bar will not preclude a habeas corpus court from considering alleged constitutional errors or deficiencies if there shall be a showing of adequate cause for

Agan filed the extraordinary motion for a new trial, he already had exhausted his direct appeals, he had received an evidentiary hearing on his selective prosecution claim, and he had begun his appeal of the denial of the selective prosecution claim.) In the alternative, the court concluded that the actions of Agan's trial attorney were based on valid tactical considerations and did not constitute ineffective assistance of counsel. The Georgia Court of Appeals declined to exercise discretionary review over the trial court's conclusions.

A state court's determination that a claim is barred from review in state court because of the petitioner's failure to comply with state law procedures for presenting the claim precludes federal habeas review of that claim, unless the petitioner can show both cause for the default and prejudice arising therefrom, *see, e.g., Pitts v. Cook,* 923 F.2d 1568, 1571 (11th Cir.1991), or that the failure to review the claim would result in a miscarriage of justice, *see, e.g., Murray v. Carrier,* 477 U.S. 478, 495-96, 106 S.Ct. 2639, 2649, 91 L.Ed.2d 397 (1986). Agan contends that he did not procedurally default this claim under

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failure to object or to pursue on appeal and a showing of actual prejudice to the accused. Even absent such a showing of cause and prejudice, the relief of the writ will remain available to avoid a miscarriage of justice where there has been a substantial denial of constitutional rights.

Black v. Hardin, 255 Ga. 239, 336 S.E.2d 754, 755 (1985). Georgia's specific rule for raising ineffective assistance of counsel claims was announced in *Thompson v. State,* 257 Ga. 386, 359 S.E.2d 664, 665 (1987). There, the Georgia Supreme Court held that new counsel must raise the issue "at the earliest practicable moment," or it will be deemed waived. *Id.* at 665; *see also Clair v. State,* 216 Ga.App. 414, 454 S.E.2d 556, 557 (1995).

Georgia's law. He argues further that, as evidenced by our decision in *Oyola v. Bowers*, 947 F.2d 928 (11th Cir.1991), we have an obligation on habeas review to apply Georgia's rules on procedural default "correctly," by which he means that we can and should correct the Georgia court's misunderstanding of its own law of procedural default. That argument flies in the face of the fundamental principle that state courts are the final arbiters of state law, and federal habeas courts should not second-guess them on such matters. *See, e.g., Pulley v. Harris*, 465 U.S. 37, 41, 104 S.Ct. 871, 875, 79 L.Ed.2d 29 (1984) ("A federal court may not issue the writ on the basis of a perceived error of state law."); *Hays v. Alabama*, 85 F.3d 1492, 1500 (11th Cir.1996) ("Petitioner is due no relief on the grounds that Alabama has misinterpreted its own law."), *cert. denied*, ___ U.S. ___, 117 S.Ct. 1262, 137 L.Ed.2d 341 (1997).

Our decision in *Oyola* is not to the contrary, as a close examination of the procedural facts of that case reveals. In 1986, Oyola was tried in Georgia for trafficking in cocaine. *See* 947 F.2d at 929. Before the trial court instructed the jury on the applicable law, it held a jury instruction conference. During that conference, Oyola's attorney did not object to instructions which failed to differentiate between actual and constructive possession of cocaine. *See id.* at 929-30. After the jury charge was given, Oyola's attorney objected on that ground, but the objection was overruled, and Oyola was convicted. *See id.* Oyola's new counsel on appeal did not raise any issue regarding the jury charge or the ineffectiveness of prior counsel. *See id.* at 930.

In 1988, the Georgia Supreme Court issued *Lockwood v. State*, 257 Ga. 796, 364 S.E.2d 574 (1988), which made clear that the jury charge in Oyola's case was erroneous. *See* 947 F.2d at 930. Oyola sought state habeas relief based on the *Lockwood* case, arguing that he had been denied effective assistance of counsel when his trial attorney failed to object in the jury instruction conference. *See id.* The state habeas court found Oyola had defaulted the ineffective assistance of counsel claim by not raising it during his direct appeal. *See id.* Oyola then sought federal habeas relief. The district court concluded that Oyola's counsel had been ineffective, but denied Oyola's petition on the ground of procedural default. *See id.* at 931. While Oyola's appeal was pending in this Court, the Georgia Supreme Court decided *Scott v. Hernandez-Cuevas*, 260 Ga. 466, 396 S.E.2d 900 (1990), which considered a state habeas claim of ineffective assistance of counsel materially identical to Oyola's. In *Hernandez-Cuevas*, the Georgia Supreme Court held that because of its novelty, the petitioner in that case should not be charged with procedural default of the *Lockwood* claim. *See* 396 S.E.2d at 900. The court also held that the *Lockwood* decision applied retroactively. *See id.* In effect, the Georgia Supreme Court in *Hernandez-Cuevas* decided that the state trial court's earlier procedural default holding in Oyola's case was wrong.

We concluded in *Oyola* that we were obligated to honor the *Hernandez-Cuevas* decision by treating Oyola's claim the same way the Georgia Supreme Court had treated Hernandez-Cuevas' claim. See 947 F.2d at 931-32. We recognized that principles of comity and federalism induce us to defer to a state court's finding of procedural

default in the case that led to the habeas proceedings. However, in Oyola's case, the intervening *Hernandez-Cuevas* decision overrode that consideration and required us to reject the finding of default in order to give effect to the most recent pronouncement on the issue by the state supreme court. *See id.* To have done otherwise would have been to follow a state trial court decision instead of a state supreme court decision on the point at issue. Of course, the latest holding of a state supreme court trumps any prior contrary holdings of lower state courts. *See, e.g., Blue Cross and Blue Shield v. Nielsen,* 116 F.3d 1406 (11th Cir. 1997) ("The final arbiter of state law is the state supreme court. . . . ").

Contrary to what Agan contends, we did not hold or even suggest in *Oyola* that, in cases where there has been no intervening state supreme court decision on procedural default, we should afford less than the usual deference to the state trial court's or state appellate court's determination of default. The *Oyola* decision only applies in the rare circumstance where an intervening state supreme court decision inescapably establishes that a lower court's prior procedural default holding was wrong. As we explained in that decision, principles of "[c]omity, federalism, and effective operation of the intertwined state and federal systems tell us not to shut our eyes and ears to what Georgia has told us." 947 F.2d at 932. In *Oyola,* the Georgia courts had told us, through an intervening Georgia Supreme Court decision, that Oyola did not default on his claim. In Agan's case, a Georgia court held that he defaulted, and there has been no intervening Georgia Supreme Court decision to the contrary. Accordingly, we follow what the Georgia court said

in this petitioner's case about how the Georgia law of procedural default applies to him.

2. *Cause for Default*

Agan did not raise his ineffective assistance claim when he was before the state trial court on remand in November and December of 1990. Instead, he waited until June of 1991, at which time he instituted a different proceeding by filing his extraordinary motion for new trial. The failure to raise the claim earlier is the procedural default the state habeas court enforced against him. As cause to excuse his procedural default, Agan asserts the novelty of this ineffective assistance claim. He argues that, because this Court did not consider the denial of the right to testify caused by an attorney to be ineffective assistance of counsel until 1992, he was not obligated to raise that claim earlier than he did.

Cause may be established upon a demonstration that a constitutional claim is "so novel that its legal basis is not reasonably available to counsel." *Dugger v. Adams*, 489 U.S. 401, 407, 109 S.Ct. 1211, 1215, 103 L.Ed.2d 435 (1989) (citation omitted). "[T]he question is not whether subsequent legal developments have made counsel's task easier, but whether at the time of the default the claim was 'available' at all." *Smith v. Murray*, 477 U.S. 527, 537, 106 S.Ct. 2661, 2667, 91 L.Ed.2d 434 (1986). We agree with the district court that it was. By August of 1990, this Court had held explicitly that defendants have a right to testify, guaranteed by the Fifth, Sixth, and Fourteenth Amendments, which may not be waived by counsel. *See United States v. Scott*, 909 F.2d 488, 490 (11th Cir.1990).

Even before that time, there were at least indications, although no direct holdings, that such was the law of this circuit. *See Wright v. Estelle*, 572 F.2d 1071, 1072 (5th Cir.1978); *Winters v. Cook*, 489 F.2d 174, 179-80 (5th Cir.1973). In November and December 1990, Agan was at the trial level of the state courts pursuing his selective prosecution claim. He had the benefit of our *Scott* decision at that time, and he should have raised the claim as a Fifth, Sixth, and Fourteenth Amendment claim in that proceeding at the latest.

Agan contends that he was not required to raise this issue before he filed his extraordinary motion for a new trial in June of 1991, because this Court did not hold until 1992 that a claim an attorney denied his client's right to testify should be considered as a denial of effective assistance of counsel, as distinguished from, or in addition to, a violation of any other constitutional guarantee. *See United States v. Teague*, 953 F.2d 1525, 1534 (11th Cir.1992). This argument is meritless. Agan could have argued that he was unconstitutionally denied the right to testify before *Teague* held that, in certain circumstances, that claim would be considered an ineffective assistance claim. Besides, Agan *did* assert the claim as an ineffective assistance of counsel claim before *Teague* was decided, which proves that the specific claim was available to him before *Teague* was decided. Agan should have asserted the claim immediately after *Scott* was decided in August 1990 or, at the latest, when he was before the state trial court in November and December of 1990. Agan has failed to establish any cause for his procedural default of this claim.

IV. CONCLUSION

We AFFIRM the district court's denial of Agan's petition for a writ of habeas corpus.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-8085

RAMSEY AGAN,

Petitioner-Appellant,

versus

JAMES VAUGHN,

Respondent-Appellee.

On Appeal from the United States District Court
for the Northern District of Georgia

(Filed Oct. 31, 1997)

BEFORE: ANDERSON and CARNES, Circuit Judges, and STROM*, Senior District Judge.

PER CURIAM:

The petition(s) for rehearing filed by Appellant Agan is DENIED.

ENTERED FOR THE COURT:

/s/ Illegible
UNITED STATES CIRCUIT JUDGE

---

* Honorable Lyle E. Strom, Senior U.S. District Judge for the District of Nebraska, sitting by designation.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS

11TH CIRCUIT

RAMSEY AGAN, Petitioner/Appellant, v. JAMES VAUGHN, WARDEN, Respondent/Appellee.	**APPEAL NO. 96-8085** (DC DKT NO.: 95-01162 1-CV-WCO)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

BRIEF OF PETITIONER/APPELLANT

[Relevant Excerpts from the Brief follow:]

* * *

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A. AS DEFINITIVELY INTERPRETED BY THE GEORGIA SUPREME COURT AND AS CHARGED BY THE TRIAL COURT, THE GEORGIA BRIBERY STATUTE UNDER WHICH PETITIONER WAS CONVICTED VIOLATED HIS FIRST AMENDMENT RIGHTS, AS WELL AS HIS DUE PROCESS RIGHTS TO HAVE A CHARGE EMBODYING HIS ESSENTIAL DEFENSE DELIVERED TO THE JURY 37

* * *

I. STATEMENT OF ISSUES

Issue One: WHETHER THE DISTRICT COURT – BY ADOPTING THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION, WHICH WERE RENDERED WITHOUT EVIDENTIARY HEARING – INCORRECTLY CONCLUDED ON THE BASIS OF THE RECORD BELOW THAT MR. AGAN'S 1988 CONVICTION UNDER GEORGIA'S 1851 BRIBERY STATUTE, THEN CODIFIED AT O.C.G.A. § 16-10-2(A)(1), DID *NOT* VIOLATE (1) HIS FEDERALLY-GUARANTEED RIGHTS UNDER THE FIRST AMENDMENT (*VIA* THE FOURTEENTH AMENDMENT) TO FREE SPEECH AND POLITICAL ASSOCIATION, TO LOBBY AND/OR PETITION ELECTED GOVERNMENTAL OFFICIALS FOR REDRESS, AND TO MAKE FINANCIAL CONTRIBUTIONS IN THE POLITICAL ARENA AND (2) HIS RELATED RIGHTS UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT, DESPITE THE OVERBREADTH AND VAGUENESS OF THE STATUTORY LANGUAGE AND DESPITE THE FAILURE OF THE STATE COURT'S JURY CHARGE TO REHABILITATE THE STATUTE BY PROVIDING SOME

MINIMALLY RATIONAL BASIS FOR THE JURY TO DISTINGUISH A "GOOD" FROM A "BAD" *INFLUENCING* CAMPAIGN CONTRIBUTION.

Issue Two: WHETHER THE DISTRICT COURT INCORRECTLY CONCLUDED THAT THE STATE COURT'S JURY CHARGE DID *NOT* VIOLATE MR. AGAN'S DUE PROCESS RIGHTS BY FAILING TO EXPLAIN IN SOME MINIMALLY RATIONAL WAY MR. AGAN'S SOLE DEFENSE AND THE EVIDENCE SUPPORTING IT.

* * *

II. STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS AND DISPOSITION BELOW.

Petitioner/Appellant Ramsey Agan (hereinafter, "Petitioner") was convicted on January 29, 1988, in the Superior Court of DeKalb County, Georgia, of the bribery of public officials under former O.C.G.A. § 16-10-2(a)(1). After exhausting his state remedies, Petitioner began serving his sentence on October 17, 1994.

On May 5, 1995, Petitioner filed a Petition for Writ of *Habeas Corpus* pursuant to 28 U.S.C. § 2254 in the Northern District of Georgia. The Respondent/Appellee (hereinafter, "Respondent") filed his Answer, supporting Brief, and other materials pursuant to Rule 5 of the Rules Governing Section 2254 cases on July 5, 1995.

In his Answer, Respondent did "*not* contest exhaustion" by Petitioner of his available state remedies. (R1-6-3. [Emphasis added.]) That concession is of course

binding on this Court. *See Oyola v. Bowers*, 947 F.2d 928 (11thCir. 1991).

Petitioner filed a 65-page legal brief on September 5, 1995, in response to the 34-page Answer-Response filed by Respondent to the initial Petition, which included no legal citations.

Treating Petitioner's initial legal brief as a reply under Local Rule 220-1, the Magistrate Judge ordered that Petitioner resubmit a 25-page brief on September 27, 1995. Petitioner filed his Resubmitted Response on October 12, 1995, together with a Motion for Reconsideration of the Magistrate Judge's interpretation and application of Local Rule 220-1.

Refusing to reconsider its earlier ruling, the Magistrate Judge entered its Order, Report, and Recommendation on November 13, 1995, recommending that the Petitioner's Petition be denied.

Petitioner duly filed his Written Objections to the Magistrate Judge's Order, Report, and Recommendation on December 5, 1995.

On December 20, 1995, the District Court adopted the Magistrate Judge's Report and Recommendation and denied Petitioner's Petition. Petitioner filed his Notice of Appeal to the United States Court of Appeals for the Eleventh Circuit on January 17, 1996; and the District Court issued a Certificate of Probable Cause for Appeal on February 27, 1996.

Subsequent to the filing of his Petition, Petitioner was released from state custody on parole; and he remains in that status.

B. STATEMENT OF FACTS

The Magistrate Judge's Order, Report, and Recommendation summarizes the facts surrounding Petitioner's criminal conviction by quoting from a subsequent Opinion of the Georgia Supreme Court as follows:

> Agan, the Honorary Turkish Consul in Atlanta, sought a building height variance for the construction of a hotel on his property. Agan and Sarper, an Emory University professor, had discussed with officials of the Emory Medical Clinic a plan to bring Turkish patients to the Clinic who would stay at the hotel. The DeKalb County Commission had twice rejected Agan's application for a variance. Agan submitted a third application, and spoke with two DeKalb County commissioners, Lanier and Fletcher, inquiring what Agan could do to insure the approval of his application. Agan told Fletcher he had a number of friends in the local Turkish-American Association who wished to contribute to Fletcher's campaign. At a meeting between Agan and Fletcher, Agan urged Fletcher to support the variance application, then left Fletcher with four checks totaling $3,700.00, made to Fletcher personally, and marked "for campaign contribution," despite Fletcher's protests that he did not even have a campaign bank account. The checks were drawn on the accounts of Sarper and three others who testified they were reimbursed for the checks by Agan and believed Agan wanted contributions to come from different people in order to give the impression he enjoyed broad support in the Turkish community. After another meeting between Agan and Fletcher in which Agan reiterated his need for

> the variance, Agan presented Fletcher with a fifth check for $800.00 marked as a campaign contribution, from a third party. Agan, accompanied by Sarper, also met with Lanier to discuss the variance. As they left Lanier's office, Sarper gave Agan an envelope at Agan's request and, back in Lanier's office, without Sarper, Agan presented Lanier with the envelope containing Sarper's check to Lanier for $3,000.00 marked "campaign contribution," despite Lanier's statement to him that he was not up for reelection for three years.

(R1-19-3, *citing State v. Agan*, 259 Ga. 541, 384 S.E.2d 863, 864-65 (1989), *cert. denied*, 494 U.S. 1057, 110 S.Ct. 1526 (1990) ("Agan II").

As a result, Petitioner was indicted on August 20, 1987 on three counts of bribery under former O.C.G.A. § 16-10-2(a)(1), Georgia's 1851 Bribery Statute, which proscribed giving a public official "any benefit, reward, or consideration to which he is not entitled with the purpose of influencing him in the performance of any [official] act."

The actual trial consumed four days, beginning on Tuesday, January 26, 1988, and ending with a jury verdict early on Friday evening, January 29, 1988. Judge Castellani presided. Petitioner's trial counsel was F. Carter Tate.

Around midday on Thursday, January 28, 1988, the State concluded its presentation of evidence. Tate moved for a directed verdict of acquittal on the basis of the vagueness of the Bribery Statute and certain language of the Georgia Ethics in Government Act that suggested that

a "campaign contribution" could lawfully be given for the purpose of "influencing" the recipient. That Motion was denied.

During the balance of Thursday afternoon Petitioner's co-defendant, Dr. Sarper, put on all of his evidence, which consisted of his own testimony and that of his common law wife, Cynthia Hyman.

The testimony of Hyman and Sarper was anything but helpful to Petitioner. For instance, Dr. Sarper's own testimony was essentially that he was duped by Petitioner. (3SR-Exh.1C-Vol.III-785.)

Dr. Sarper went on to refer to the $3,000.00 check Petitioner asked him to write to Lanier as being "shocking" in size; to the car Petitioner was driving as being "one of his Cadillacs"; and to Petitioner's use of the inflated title "Consul General" with the Commissioners as part of an attempt by him "to impress the politicians with his power, influence and what a big guy he was." (3SR-Exh.1C-Vol.III-703,707,781.)

Worse yet, the supposedly "naive" Dr. Sarper came off as a thoroughly cynical and dishonest henchman. On cross-examination he readily conceded that he felt that the purposes of the "campaign contribution" checks was to buy the Commissioners' support for Petitioner's project (3SR-Exh.1C-Vol.III-736-37,784):

> When you make political contributions to politicians, they do something to expedite the process. Everybody knows that.

Similarly, Dr. Sarper stated that politicians "as[k] for donation[s] to get that, to cast [their] . . . vote." And he

readily conceded that "[e]ssentially what it boils down to" is that Petitioner was saying to the Commissioners, "I need your support[,] I have got three votes[,] I need another," and he had to "give money to get [that] support." (3SR-Exh.1C – Vol.III- 748,737.)

Also, the supposedly naive, professorial Dr. Sarper fairly boasted on cross-examination that "I don't believe in voting" and "don't [place any moral value on a vote]." (3SR-Exh.1C-Vol.III-746-48.)

After court adjourned Thursday evening Attorney Tate asked Petitioner to meet him back at his office. When Petitioner arrived at Tate's office, Tate told Petitioner that he had made up his mind and that he would rest their case first thing in the morning. He did not plan to call ***any*** witnesses. (6SR-Exh.5C-App.B-Exh.A-3.)

Petitioner vociferously protested. (.5C-App.B-Exh.B-7.)

Tate was pinning his hopes on the legal argument that no clearly-denominated "campaign contribution" that was unconditionally given to an elected official could be considered a bribe within the scope of the Bribery Statute.

Tate shouted: "Goddammit, Ramsey, it's my decision. You are a mortgage banker; you run your business, I'll run mine. I'm the lawyer; you've come to me. This is my case, and I've decided that you are not going to take the stand. You are not going to testify. If you want it done another way, you'll have to get another lawyer." (.5C-App.B-Exh.B-13.)

When court opened, Tate instructed Judge Castellani as follows: "*I* made some big decisions last night, your Honor. We are not going to present any evidence." (3SR-Exh.1C-Vol.IV-791.)

Tate **never** told Petitioner that he had a right to testify. He **never** told him that the Court might very well have refused to allow him to withdraw from Petitioner's case at the eleventh hour, had he sought to do so. He **never** told Petitioner that he had a personal right to testify that possibly took precedence over Tate's professional prerogatives over trial strategy. (6SR-Exh.5C-App.B-Exh.A-7.)

Judge Castellani made no inquiry of Petitioner as to whether he was in agreement with Tate's announced decision not to put on any evidence, especially insofar as it affected his right to testify. (3SR-Exh.1C-Vol.IV-791.)

Ironically, Judge Castellani then proceeded to refuse to give most of Tate's requested charges to the jury on the critical legal points he was relying on and to explain the evidence supporting them, even though they embodied the only defense that Petitioner had left – no factual defense having been mounted.

Later that evening, Friday, January 29, 1988, the jury, after deliberating about two hours, found Petitioner and Dr. Sarper "Guilty" on all three counts.

Specifically, the trial court rejected various Requests to Charge from Petitioner, which embodied his theory that the prohibition in the 1851 Georgia Bribery Statute against giving a public official "**any benefit, reward, or**

consideration to which he is not *entitled* with the purpose of *influencing* him in the performance of any [official] act," if it is to be constitutionally applied under the First Amendment to *elected* officials – who *are* entitled to receive campaign contributions – must be read together with language in the recent Georgia Ethics in Government Act, which specifically contemplated that certain public officials, *i.e.*, those holding elective office, are *entitled* to receive and use private contributions for campaign purposes, even though they may have been given "to encourage or *influence*" the official in the performance of his duties. (3SR-Exh.1C-Vol.IV-821.)

In short, Petitioner contended through Tate that the Ethics in Government Act recognizes that under certain circumstances there can be **good** "influencing" campaign contributions, especially in light of the sociological fact of modern life that it is commonly accepted practice in this era of PAC's for campaign contributions to be made and accepted under circumstances where the fact or amount of the contribution is intended to reflect the size of the interested constituency and to favorably **influence** the recipient at least to the extent of giving them and their views so-called "access" or consideration.

As to how the jury should be charged to distinguish "good" from "bad" influencing contributions, Petitioner had proffered the court the Quid Pro Quo Rule in his Request to Charge No. 9.

In particular, his Requests to Charge No's 3 through 8 embodied the following coherent theory of a valid campaign contribution, which the jury was never allowed to hear:

> One may lawfully make a campaign contribution by check payable directly to an incumbent office holder [Request to Charge No. 3, citing O.C.G.A. § 21-5-33] – for use by him in a future campaign [Request to Charge No. 5, citing O.C.G.A. § 21-5-33] – even though that contribution may "reasonably be construed to influence" the incumbent in the performance of his duties [Request to Charge No. 4, citing O.C.G.A. § 21-5-3(6)] – and it is the incumbent's clear legal responsibility to report the contribution [Request to Charge No. 7, citing O.C.G.A. § 21-5-34] – and under no circumstances may the incumbent use the contribution for personal use unless all donors are notified, etc. [Request to Charge No. 6, citing O.C.G.A. § 21-5-33(c)] – and if the jury finds that the payments in question to Commissioners Fletcher and Lanier were such a campaign contribution, it must acquit [Request to Charge No. 8].

(Request to Charge No. 9 elaborated on Request to Charge No. 4 by stating that a campaign contribution may validly be used to influence a pending matter unless it is "conditional." That Request to Charge was withdrawn in light of the absence of any reasonable evidence that Petitioner asked for or received a *quid pro quo* promise in return for his campaign contributions.)

After all, throughout their private discussions of the merits of his project, which included a meeting with an engineer, the two Commissioners expressed probable opposition to Petitioner's application. Yet when pointedly asked by each Commissioner (for the benefit of hidden S.B.I. video cameras) what he expected in return for the contributions, Petitioner strenuously reiterated that he

expected nothing beyond the respectful hearing he had already received. (3SR-Exh.1C-Vol.II-286&401.)

To Commissioner Lanier he stated (3SR-Exh.1C-Vol.IV-Exh.18A-23):

> Nothing, not a thing, that's one thing I want to make clear, nothing, because I appreciate what you have done for me so far previously. . . .

In response to Commissioner Fletcher's statement that the campaign contributions were "unusual" and made him "feel funny" because he allegedly had never before received contributions from someone with a matter pending before the Commission, Petitioner averred (3SR-Exh.1C-Vol.IV-903-Exh.24A-8-9):

> Well, it's not supposed to – well, I don't want you to be under pressure. . . . I am not asking for anything except I will assure you, the way I feel, you will be doing service to the county because where's the tax base; and the proposed use for it will be . . . enhancing.

The actual charge delivered by the Court on the substantive elements of the crime covered a scant 53 lines – roughly 450 words. (3SR-Exh.1C-Vol.IV-809(1.7)-811(1.9).)

Almost one-half of that brief space was devoted to a statement of the definition of bribery under Section 16-10-2(a)(1) in which the court defined "entitled" (as that word appears in the phrase "any benefit, reward, consideration to which he is not entitled") as meaning simply and misleadingly "to give a deed or title to." (*Id.*)

Then, abruptly, with no logical transition, the trial court launched into a terse discussion of the subject of campaign contributions (3SR-Exh.1C-Vol.IV-810(11.5-22)):

> Now, there is in Georgia law an Act which is known as the Ethics in Government Act. This Act, among other things, discusses campaign contributions. Let me define for you, under the Ethics in Government Act, the definition of a campaign contribution . . . [omitting '[im]material' and [ir]relevant' portions]: a campaign contribution means a gift, an advance or deposit of money, or anything of value, conveyed or transferred, for the purposes of influencing the nomination for election or election of any person for office.

The Court went on to say that "a campaign contribution, as I have just defined for you, can be made directly to the [candidate] for use in future campaigns for elective office." The court then concluded cryptically as follows (3SR-Exh.1C-Vol.IV-810-11):

> In this regard, and in light of the instructions I have given you earlier, I will tell you that it is not the use to which the money may be put, but it is the purpose for which the money was paid that controls.

That is the charge the Court gave and in no way did it substantially cover Petitioner's legal theory of the permitted scope of a **campaign** contribution.

Indeed, nowhere did the trial court directly state, as in Request to Charge No. 8, that a valid campaign contribution, *even as he defined it*, could not be considered a bribe; nor did he even imply as much, unless we interpolate "lawfully" into the following phrase: "a campaign contribution, as I have just defined for you, can [lawfully] be made *directly* to the candidate. . . . " In fact, however, the underscored language was the real thrust of this

instruction, since it was designed to make the point in Request to Charge No. 3 that a valid campaign contribution check may be made directly payable to the candidate.

The actual charge to the jury failed to grapple in any direct or meaningful way with the vital public issue of the legal interrelation, *i.e.*, the permissible boundary line, between (i) campaign contributions and lobbying efforts and (ii) bribes.

Along with Request to Charge No. 8, the trial court rejected Request to Charge No's 4, 6, and 7. (3SR-Exh.1C-Vol.IV-821.)

Rejected Requests to Charge No.'s 6 and 7 related to the clear duty under Georgia law of the recipient of earmarked campaign contributions, such as were made to Commissioners Fletcher and Lanier, to report those contributions and *not to use them for personal gain*.

Without those two instructions, the jurors may have labored under the impression, which was cultivated by District Attorney Wilson, that politicians have greater legal latitude than they in fact do to put campaign contributions to personal use. Accordingly, Petitioner was denied the presumption that he was aware of this law and of its obligatory operation on the Commissioners in question.

For instance, in this exchange with Ms Hyman on cross-examination, Mr. Wilson deliberately burs all legal distinction between unrestricted cash gifts and "campaign contribution" checks (3SR-Exh.1C-VolIII-633):

> Wilson: . . . Will you agree that if one takes the check, puts it in one campaign account, sends out the thank-you note . . . , aren't you still getting the use of the money?
>
> Hyman: I don't – do you get to use the campaign money or –
>
> Wilson: Got it for my campaign.
>
> Hyman: For your own purposes?
>
> Wilson: Isn't everything nice and neat looking up on the surface, doesn't it make it difficult for everybody else to figure out the truth?

What the trial court did do was grudgingly concede that a campaign contribution could have *only one* valid purpose under Georgia law in this situation, namely, to influence the reelection of the Commissioners – and, as indicated, even that concession was ambiguously made. (3SR-Exh.1C-Vol.IV-810(11.17-22).)

The clear implication, therefore, is that if a campaign contribution is also made with the intent of influencing a vote, it falls squarely within the bribery statute.

And what specific criminal intent did the trial court require the jury to find? It charged that it is merely the intent "to commit the act which is prohibited by a statute," and this intent may "be inferred when it is *the natural and necessary consequence of an act,*" – or "the natural and the probable consequenc[e] of his act." (3SR-Exh.1C-Vol.IV-805.)

Thus, the trial court's charge sealed Petitioner's fate by making the verdict a mini-plebiscite on the apparent impropriety of the widespread practice of DeKalb County

developers making large campaign contributions to the DeKalb County Commissioners who continually rule on projects of direct interest to their political patrons.

Indeed, the Court's charge seemed to have been unwittingly designed to offer Petitioner up as a scapegoat for the abuses in a zoning system of which he was and remains arguably a primary victim.

As noted, the trial court refused Request to Charge No's 6 and 7, which would have made it plain to the jury that Petitioner was entitled to rely on the fact that the Commissioners were legally obligated to report the payments in question on campaign disclosure forms and to deposit the payments in separate campaign depository accounts and *not* to use them to defray personal expenses except under a set of onerous restrictions. *See* O.C.G.A. Section 21-5-33(b)(1)(F). Although the jury was charged that Petitioner could be convicted on the basis that we are all presumed to know the law, the trial court insisted on keeping the jury ignorant of another law, which he was also presumed to know, and which supplied the legal context for his campaign contributions.

Instead, the Court allowed the State to depict Petitioner as having made a campaign contribution that the recipient was free, so far as the jury knew, to pocket – a perception that was deliberately fostered by District Attorney Wilson's instructions to the two Commissioners to violate the Ethics in Government Act by cashing the "campaign contribution" checks, his suggestions throughout the trial that "campaign contribution" checks and cash were fungible, and his sensational use of the

cash proceeds of his checks in his closing argument to the jury. (5SR-Exh.4B-59-65.)

That calculated impression could only have further aroused the jury's outrage at the general spectacle of influence-buying that Georgia law knowingly tolerated in 1987-88 in the absence of any state counterpart to the Federal Election Campaign Act – and in the absence of any apparent legal curbs on the ability of politicians to convert contribution checks to personal cash.

Again, most decisively of all, the trial court charged the jury that a man may be presumed to intend the "natural and probable consequences" of his actions; accordingly, the jury was set free to convict Petitioner on the basis of the apparently widespread popular belief in DeKalb County (as reflected in Judge Castellani's own sentencing remarks (3SR-Exh.1C-Vol.IV-863-66.) and elsewhere that any substantial campaign contribution made directly to a County Commissioner, which the latter is ostensibly free by law to pocket for his own use and which is made while a zoning application by the contributor is pending, has the "natural and probable consequence" "of influencing him in the performance of a[n official] act" – which was the only intent necessary under the trial court's instructions to convict Petitioner.

To repeat, the trial court grudgingly conceded that a campaign contribution could have *only* one valid purpose under Georgia's Bribery Statute, namely, to influence the **re-election** of the Commissioners.

Again, the clear implication to the jury was that if a large campaign contribution was also made with the hybrid or mixed motive of garnering some influence or

access as well, it would fall squarely within the Bribery Statute.

What specific criminal intent did the trial court require the jury to find? To repeat: It charged that it is merely the intent "to commit the act which is prohibited by a statute," and that intent may "be inferred when it is *the natural and necessary consequence of an act*," – or "the natural and the probable consequenc[e] of his act."

Again, Petitioner contends that abbreviated charge sealed his fate by making the verdict a mini-plebiscite on the apparent impropriety of the widespread practice of DeKalb County developers making large campaign contributions to the DeKalb County Commissioners, who continually rule on projects of direct interest to their political patrons.

The jury was in effect set free by the trial court to convict Petitioner purely on the basis of the chronological coincidence between (i) any substantial campaign contribution made directly to a County Commissioner, which the latter is ostensibly free to pocket for his own use, and (ii) lobbying efforts by the contributor in support of a pending land use application before the recipient, since it is popularly inferred that all such contributions do have the "natural and probable consequence" "of influencing [the recipient, at least to some intangible extent] in the performance of a[n official] act" – which was the only intent necessary under the trial court's instructions to convict Petitioner.

After his conviction, Petitioner successfully argued to the Georgia Court of Appeals, in the context of a First Amendment "facial" vagueness/overbreadth challenge to

the former Georgia Bribery Statute that it should exercise its inherent power to find a narrower, saving construction of the local statute, while excising the unconstitutional remnant.[1]

In short, Petitioner succeeded in getting the Court of Appeals to update Georgia's 139-year old general bribery statute by reference to a more modern statute that recognizes that legitimate campaign contributions may be intended to "influence" the recipient. Many states have similarly-worded bribery statutes that were manifestly designed for a pre-PAC horse and buggy era. More particularly, they were not designed to be applied to elected officials at all, especially those with broad discretionary powers, a perceived duty to be responsive to the legitimate political grievances of their constituents, and the right to receive campaign contributions.

Unfortunately, as numerous commentators have noted, once old bribery statutes like Georgia's are applied literally to elected officials, there is no basis for distinguishing between a bribe and a protected campaign contribution other than the utterly vague notion of "corrupt" intent to influence, thus clearly implicating First Amendment vagueness/overbreadth concerns, especially in light

---

[1] After all, in delineating the reach of local statutes, state courts, unlike federal courts, have it within their inherent common law power "to construe and narrow state laws," *Grayned v. City of Rockfort, supra*, 408 U.S. at 110, S.Ct. at 2300; whereas, federal courts may only make a good faith effort to "extrapolate . . . [the] allowable meaning" of an ambiguous statute based on its actual meaning, legislative history, local interpretations of analogous statutes, etc. *Id. See, e.g., Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985).

of *Buckley v. Valeo*, 424 U.S. 1, 41, 96 S.Ct. 612, 645 (1976)[2] *See, e.g., Note, Campaign Contributions and Federal Bribery Law*, 92 Harv. L. Rev. 451, 453-55 (1978).

In short, once it is conceded that a campaign contribution can be a "thing of value" for bribery purposes, "the result is that the potential sweep of the bribery statutes is enormous." Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 52 U.C.L.A. L. Rev. 784, 809 (1985) ("Political Bribery").

Petitioner pointed out to the Court of Appeals that – to avoid that standardless sweep – numerous federal courts have found a solid core of constitutionally proscribable activity through application of the "bright line" of the so-called *Quid Pro Quo* Rule.[3] *See, e.g., United States v. Dozier*, 672 F.2d 531, 540 (5thCir. 1982).

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[2] The legal concept of vagueness grows out of due process concerns and pertains to the failure to alert a person of common intelligence as to what conduct is legally forbidden, that is, the failure to give fair notice of what conduct to avoid. *Connally v. General Construction Company*, 269 U.S. 385, 391, 46 S.Ct. 126, 127 (1926); *Papachristou v. Jacksonville*, 405 U.S. 156, 162 (1973).

Statutory imprecision or vagueness creates at least three additional problems of especial moment where, as here, the legislation imposes criminal penalties in an area permeated by First Amendment interests. *Buckley v. Valeo*, 424 U.S. 1, 41, 96 S.Ct. at 645 (1976). *See Grayned v. Rockford*, 408 U.S. 104, 108-09 n.4 (1972); and *Kolender v. Lawson*, 461 U.S. 352, 358 (1983), *quoting Smith v. Goguen*, 415 U.S. 506, 574-75, 94 S.Ct. 1242 (1974). Hence greater judicial scrutiny will be employed and a greater degree of specificity required by the reviewing court than in other contexts. *Buckley v. Valeo, supra*, 424 U.S. at 41, 96 S.Ct. at 645; *Smith v. Goguen, supra*, 415 U.S. 573, 94 S.Ct. at 1247.

[3] That analysis has since been confirmed by the U.S. Supreme Court's decision in *McCormick v. United States*, 500 U.S.

Otherwise, every bribery jury would be armed with the *ad hoc* discretion to convict campaign contributors simply on the basis of the common-sense inference that they intended "the natural and probably consequence of their donations" – which the Supreme Court in *Buckley v. Valeo* described as the "real or imagined coercive influence of large financial contributions on candidates' positions and on their actions. . . . " 424 U.S. at 25, 96 S.Ct. at 638. The Supreme Court adduced the obvious legal difficulties in distinguishing good from bad "influencing" campaign contributions as a key factor justifying the prophylactic campaign disclosure requirements under the

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257, 111 S.Ct. 1807 (1991). In determining that the *Quid Pro Quo* Rule is the only logical way to interpret the federal bribery statute, the Supreme Court observed as follows:

> *Whatever ethical considerations and appearances may indicate,* to hold that legislators commit the federal crime of extortion when they act for the benefit of constituents or support legislation furthering the interests of some of their constituents, shortly before or after campaign contributions are solicited and received from those beneficiaries, is an unrealistic assessment of what Congress could have meant by making it a crime to obtain property from another, with his consent, under cover of official right. To hold otherwise would open to prosecution not only conduct that has long been thought to be well within the law, but also conduct that in a very real sense is unavoidable so long as election campaigns are financed by private contributions or expenditures, as they have been since the beginning of the nation. It would require statutory language more explicit than the Hobbs Act contains to justify a contrary conclusion.

111 S. Ct. at 1816 (emphasis added).

Federal Election Campaign Act. 424 U.S. at 67, 96 S.Ct. at 657.

At the time of Petitioner's conviction under the 1839 Bribery Statute, Georgia had a similar modern campaign disclosure law.[4]

The Court of Appeals held in *Agan v. State*, 191 Ga. App. 92, 380 S.E.2d 757 (1989) (*"Agan I"*), *rev'd by State v. Agan*, 259 Ga. 541, 384 S.E.2d 863 (1989) (*"Agan II"*), (i) that the trial court's charge to the jury on the meaning of "entitled," as it appears in the Bribery Statute, was so "incomplete and misleading" as to be reversible error, because it failed to construe its meaning *in pari materia* with the Ethics in Government Act and (ii) that the court's failure to give certain of Respondents' requested charges based on the Ethics in Government Act, especially Charge No. 4, or to explain the evidence supporting them was reversible error since they embodied the

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[4] Georgia's Ethics in Government Act "entitled" *elected* public officials in Georgia to receive campaign contributions provided that they were reported and accounted for as provided in the Act. After defining a campaign "contribution" as anything of value given for the express purpose of influencing a political election, the Georgia Act went on to define as "campaign contributions" within the purview of the Act:

> "other forms of payment made to candidates for office or who hold office when such fees and compensation . . . *can be reasonably construed as a campaign contribution designed to encourage or influence the candidate or officeholder to introduce legislation which enriches the person, company, corporation, or other entity which made the contribution.*" O.C.G.A. Section 21-5-3(6).

Respondents' sole defense – temporarily reversing Petitioner's conviction

> Pretermitted Charge No. 4 provided as follows:
>
> A campaign contribution is a payment which *can* reasonably be construed to encourage or influence a public officer holding elected office.

In particular, the Court of Appeals decided that the prohibition in the Bribery Statute against giving a public official "**any benefit, reward, or consideration to which he is not *entitled* with the purpose of *influencing* him in the performance of any [official] act**," O.C.G.A. Section 16-10-2(a)(1) (emphasis added), had to be read together with language in the Ethics in Government Act which specifically contemplates that certain public officials, *i.e.*, those holding elective office, are *entitled* to receive and use private contributions for campaign purposes, even though they may have been given "**to encourage or *influence***" the official in the performance of his duties. *Agan I*, 380 S.E. 2d at 761-62, *citing* O.C.G.A. Section 21-5-3(6) (3rd sentence).

In short, the Court of Appeals found that O.C.G.A. § 21-5-3(6) acknowledged the common-sense reality, highlighted by the Supreme Court in *Buckley*, that the purpose of many legitimate campaign contributions is unclear and can just as reasonably be construed to be that of influencing the incumbent's vote rather than his reelection prospects.

For the reasons urged by the State on *certiorari*, the Georgia Supreme Court in *Agan II* repudiated the saving construction given the Bribery Statute by the Court of

Appeals. Succumbing to political pressure, the Court lampooned the holding by the Court of Appeals as nothing short of a declaration that:

> [I]f money given to an office holder qualifies as a campaign contribution, requiring reporting under the Ethics in Government Act, O.C.G.A. § 21-5-1 *et seq.*, then it cannot be a bribe.

Agan II, 384 S.E.2d at 866. That is obviously untrue, since the Court of Appeals remanded Petitioner's case for retrial. On retrial, the trial court would have been free to adopt a rule similar to or even different than the *Quid Pro Quo* Rule to assist the jury in differentiating a permissible from an impermissible "influencing" campaign contribution.

To be sure, in definitively refusing to construe the Bribery Statute *in pari materia* with the Ethics in Government Act, the Georgia Supreme Court *correctly* noted that there is no necessary reason in logic why the fact that a contribution is made reportable by the recipient under the Ethics in Government Act should necessarily control its interpretation of the Bribery Statute. But in so saying, the Court arguably missed the whole point of the exercise engaged in by the Court of Appeals – namely, that a saving construction of the Bribery Statute was mandated by the First Amendment.

Federal courts insist on giving the first opportunity to narrow an allegedly vague/overbroad state statute to the state courts, because of federalism and comity concerns and because state courts have broader common law powers of construction *vis-a-vis* local laws. And the point

of such federal deference is to give state courts latitude to give local statutes their own narrowing construction.

Consistent with its essential duty under the First Amendment, the Georgia Court of Appeals in *Agan I* did not go as far as to adopt the precise *Quid Pro Quo* Rule employed by federal courts in interpreting federal statutes, but it did insist that the trial court on remand acknowledge that a valid campaign contribution *could* be made to "influence" the recipient – and then left it up to the trial court to decide what additional instructions were necessary to enable the jury to differentiate a "good" from a "bad" influencing campaign contribution. At a minimum, the Court of Appeals insisted that the trial court give Petitioner's requests to charge 2, 3, 4, & 8, after adjusting them to the facts of the case. *See Agan I*, 380 S.E.2d at 762-63.

Petitioner argued before the Court of Appeals that *some* narrowing construction of the Bribery Statute as charged by the trial court was constitutionally mandated; and, while the decision by the Court of Appeals did not go as far as the *Quid Pro Quo* Rule advocated by Petitioner on appeal, it may well have sufficed to cure the basic First Amendment problem. After all, the Court of Appeals' approach was predicated on Petitioner's own Requests to Charge.

Unfortunately for Respondent (*not* Petitioner), the Georgia Supreme Court has now definitively interpreted the Georgia Bribery Statute, repudiated the Court of Appeals, and – using the illustrative federal *Quid Pro Quo* Rule as a scarecrow – concluded that the Bribery Statute as charged required no narrowing. On the contrary, it

concluded – as Respondent notes – that the trial court's charge to the jury on the meaning of "entitled" was already overly restrictive:

> [B]ecause the more appropriate meaning of "entitled" is more restrictive than the definition given by the trial court, we view any error as helpful to the accused, and harmless.

Agan II, 384 S.E.2d at 867.

Thereafter, on June 6, 1991, Petitioner filed an Extraordinary Motion for a New Trial based on a hybrid Fifth/Sixth/Fourteenth Amendment claim of denial of his right to testify and ineffective assistance of trial counsel, having failed to raise such a claim in his initial appeal. The Extraordinary Motion was motivated by this Court's subsequently vacated decision in *Nichols v. Butler*, 917 F.2d 518 (1990). The Extraordinary Motion was accompanied by a lengthy Affidavit by Petitioner's trial counsel, Mr. Tate, which corroborated the above facts. (6SR-Exh.5C-App.B-Exh.A.)

The same day, the trial court issued a Rule *Nisi*, scheduling a hearing on the Extraordinary Motion for July 30, 1991. Thereafter, on June 26, 1991, the trial court decided for reasons of "judicial economy" to delay the hearing on the Extraordinary Motion until the Georgia appellate courts could decide Petitioner's pending appeal from the earlier Order by the trial court, entered January 7, 1991, denying his Motion to Dismiss for Selective Prosecution. Petitioner's unsuccessful efforts to overturn the trial court's Order after remand in *Agan II* on the issue of selective prosecution culminated in a denial by the

United States Supreme Court on October 4, 1993, of a Petition for Certiorari.

Thereafter, the trial court issued its second Rule *Nisi*, scheduling a hearing on the Extraordinary Motion for March 2, 1994.

As Mr. Tate conceded at the hearing, his defense of Petitioner was a highly technical defense, in which he argued that Petitioner's "actual intent" should be deemed irrelevant under the "bribery statute," since the evidence *introduced by the State* indicated (1) that Petitioner had attempted to denominate his payments to the Commissioners as "campaign contributions" under the Ethics in Government Act, and (2) that Petitioner had not conditioned his payments on the receipt of a *quid pro quo*. Attorney Tate's decision not to allow Petitioner to testify was combined with his decision to put on *no* witnesses, making the impact of the former worse. In both cases Mr. Tate said he didn't want to cloud the legal issue on appeal with the facts.

Thus, the jury was given no direct evidence by the defense as to Petitioner's actual intent, save the circumstantial inferences to be drawn from the fact that he labeled the payments "campaign contributions" and did not demand a *quid pro quo*.

As Mr. Tate recalled at the hearing, his defense strategy provided District Attorney Wilson with a huge target in his closing argument. (6SR-Exh.5A-8-9,10-11,38-39.) The D.A. cut through the technical niceties of Mr. Tate's

defense and suggested that Petitioner, whatever his precise words, written or oral, was inwardly (if not outwardly) winking at the Commissioners – as if to say, "You know what I am really after here":

> If it walks like a duck, if it quacks like a duck – it's a duck.

If you write "campaign contribution" on the side of a cow, it's still a cow. (6SR-Exh.5A-38.)

Again, Mr. Tate readily acknowledged that had Petitioner been allowed to testify, he could have provided extremely valuable direct and obviously non-cumulative exculpatory testimony as to his own actual intent in making the disputed payments. Mr. Tate cited a long history leading up to the payments by Petitioner, which Tate indicated would have indicated to the jury that Petitioner did not feel that he was buying any "official" action by the Commissioners (to use the language of the Bribery Statute), but was merely positioning himself to obtain informal access to the ear of the Commissioners so that the substantive merits of Petitioner's proposal would receive more careful scrutiny. (6SR-Exh.5A-12,22-23.)

Mr. Tate identified one particularly powerful piece of exculpatory evidence that Petitioner had to offer, which was not only consistent with his allegations as to his own intent, but which would have helped defuse a particularly troubling piece of evidence introduced by the State. (6SR-Exh.5A-14-15.)

The State showed the jury a videotape of a meeting among Petitioner's co-defendant, Rauf Sarper, Commissioner Robert Lanier, and Petitioner. (3SR-Exh.1C-Vol.II-286.) After the meeting, at which Petitioner asked

for assistance with his zoning project but was rebuffed or discouraged by Mr. Lanier, Sarper and Petitioner leave, but then Petitioner later returns by himself and awkwardly gives the Commissioner a number of "campaign contributions." The jury doubtless held Petitioner responsible for the peculiar nature of this exchange – as did the Georgia supreme Court in *Agan II*. It made it appear that Petitioner, as distinct from Dr. Sarper, was attempting to work out some suspicious arrangement with Commissioner Lanier that may have smelled of a bribe.

In actuality, as Mr. Tate testified, the true circumstances of that awkward exchange would have exculpated Petitioner. By prearrangement between Sarper and Petitioner, Dr. Sarper was supposed to give the campaign contribution checks in question to Commissioner Lanier while we were in his office. After the two of us left the office, Petitioner demanded of Sarper why he had failed to deliver the campaign contributions checks. Sarper, consistent with his cynical testimony on the witness stand, said that it was pointless to give the checks to Commissioner Lanier, since he obviously had no intention of helping Petitioner. Petitioner reminded Sarper that the checks really "were" campaign contributions and that he was already committed to giving them to Commissioner Lanier, since he had been good enough to hear Petitioner out. (6SR-Exh.5A-14-15,16-17.)

Sarper's conviction was reversed by the Court of Appeals on the basis of insufficiency of evidence.

In addition, Petitioner testified at the hearing that he was anxious to get on the stand to counter the cynical impact created by the testimony of his co-defendant, Dr.

Sarper, and Sarper's common-law wife, Cynthia Hyman – which (as confirmed by Mr. Tate) was not at all helpful to Petitioner's defense.

In addition, Petitioner testified that one very damaging aspect of the State's case was the unrebutted assertion that he was constantly badgering the Commissioners by coming to see them multiple times. Petitioner indicated that his testimony would have revealed that in fact it was the Commissioners who repeatedly asked him to come back to see them in an apparent effort to "set [him] up" and make Petitioner look bad. (6SR-Exh.5A-52-54.)

Had Petitioner taken the stand, he might have given the jury a critical understanding of the factual background to his meetings with the Commissioners. Instead, the jury was denied all insight into why he viewed himself as more the victim of circumstances than their cunning manipulator. By contrast, Dr. Sarper testified that he had been dragged along by Petitioner and did not know what was happening and did not pay attention: "I didn't understand the topic, I did not pay attention. Quite frankly, I didn't give a damn." (3SR-Exh.1C-Vol.III-779.)

Some of that omitted background was later recounted at the sentencing hearing by Benjamin C. Abney, Petitioner's business lawyer, one of the available defense witnesses whom Tate refused to call. (3SR-Exh.1C-Vol.IV-848-51.)

First, Mr. Abney related that Petitioner had previously owned nearby property in Fulton County, situated on the northeast quadrant of I-285 and Ga. 400, on which

the Landmarks Group later began its mammoth Concourse Office Development. Petitioner attempted unsuccessfully to get it rezoned for a hotel. Petitioner then got the Georgia courts to mandate a new constitutional zoning classification by the Fulton County Commission; instead, the Commission made negligible changes to the old zoning and it was "back to square one." Faced with another financially ruinous cycle of litigation, Petitioner sold the property and it was promptly acquired by the Landmarks Group, whose President, Blaine Kelley, was one of the principal political supporters of the County Commission Chairman Lomax.

In short order, the Landmarks Group was able to snap its fingers and get the Commission to reconsider the merits of the proposal and obtain a massive rezoning for hotel and office density.

Picking up with Mr. Abney's narrative (3SR-Exh.1C-Vol.IV-849-51):

> Now that brings us to the DeKalb County zoning. Here is another piece of property. Again, [Agan] wants to develop a hotel. He puts his plan together, he takes it to the County, the professional staff approves it, it goes before the council to be approved, they show up for a hearing, no one there is opposed, the neighborhood doesn't oppose it, no one is heard in opposition. He is voted down. He is stunned. What is going on? His reaction is he had been discriminated against because of his nationality. He is very suspicious of what has happened.
>
> I have already told the court he is a hard-working man. He goes to work on this and he sees what goes on in DeKalb County, studies it to

> death, bothers the commissioners to death, he is a very persistent man and he learns well. People . . . who are plugged-in politically to DeKalb County make contributions. Mr. Agan thinks, is this so? Can this be? Can you do this?
>
> Here is what he does next. This is important. He calls me on the telephone, he say, "I am told that these developers make political contributions in DeKalb County. Can this be done? Is this right?" I told him it was not illegal. I didn't know the details. . . . I told him it was okay, campaign contributions, limited to that, in exchange for nothing, no action or inaction. And, so, that is how he got into this mess.

In Petitioner's own testimony he would have laid a similar foundation for his actions. In addition, Petitioner had assembled a list of the names of all persons who made contributions to Commissioners Lanier and Fletcher during the years 1982 to 1987, and a list of the names of all such donors who had interests in matters pending before the Commission at the time the contributions were made. Comparing the two lists, Petitioner determined that Commissioner Lanier had received 221 simultaneous contributions from donors with matters pending before the Commission in the years 1982, 1986, and 1987 alone, totaling $164,900; whereas, Commissioner Fletcher had received 31 such contributions in 1984, totaling $11,950. *See Agan II,* 384 S.E.2d at 868 & n.5 (1989).

This contrasted with the suggestion by the State that making contributions while having a matter pending before the Commission was highly irregular and that this fact alone suggested a corrupt motive for which Petitioner deserved to be singled out and punished.

Finally, Mr. Tate readily conceded that one reason for not allowing Petitioner to testify was to keep him from describing the circumstances behind the videotape *even though* the effect of that explanation would have been to exculpate Petitioner: On the other hand, Mr. Tate pointed out that the testimony would have a very damaging, incriminating impact on Dr. Sarper. Mr. Tate indicated that because the Court had refused to sever the trial of the two defendants and because it was his subjective opinion that in the eyes of the jury the two men would inevitably sink or swim together, the incriminating effect of Petitioner's testimony on his co-defendant might well outweigh its exculpatory impact on Petitioner and result in his shooting a hole in the bow of their "common" boat. (6SR-Exh.5A-13.)

Furthermore, Mr. Tate confirmed that he positively preferred the jury not to hear Petitioner's case on the full substantive merits, because he felt that as a practical matter the appellate courts would be less likely to adopt his technical arguments if it was clear that the defendants had put on a plenary defense and had been found guilty "on the merits"! (6SR-Exh.5A-47.)

In addition, Mr. Tate indicated that because of Petitioner's halting command of English, he might be particularly susceptible to being twisted into knots on cross-examination, which might impair his credibility to the jury. (6SR-Exh.5A-35,36-37.)

Again, Mr. Tate was clear that he had no specific concerns that Petitioner would commit perjury, and that his vague suggestion that some generalized concern about "perjury" may have played a *small* role in his

decision was simply his inartful way of saying that he was afraid Petitioner would become crossed up in his testimony and hurt his own credibility, especially given his halting use of English. Mr. Tate acknowledged that Petitioner wanted to testify as to many "truthful" and exculpatory things.

Finally, Mr. Tate acknowledged that his continued conviction that he made the right tactical decision by not putting Petitioner on the stand in the first place does *not* make allowance for the 20/20 hindsight he now enjoys to the effect that the appellate courts of Georgia would definitively reject his theoretical defense. Given that the jury obviously put definitive weight on the issue of "actual intent" – and the Georgia appellate courts have *now* confirmed the propriety of that focus – Mr. Tate conceded that he is no longer sure in retrospect that his tactical decision not to allow Petitioner to testify was the correct one.

Accordingly, Mr. Tate acknowledged that there is a "reasonable probability" that Petitioner's testimony would have induced a reasonable doubt as to his guilt. (6SR-Exh.5A-46-47.)

The trial court denied Petitioner's Extraordinary Motion on August 9, 1994. (6SR-Exh.5B.)

In denying Petitioner's Motion, the trial court reached the remarkable conclusion that Petitioner's "testimony would have added nothing to the defense" – when, in fact, Mr. Tate put on no factual defense, so that the effect of Petitioner's failure to testify was exacerbated by his failure to put on other witnesses. The trial court further justified its holding by concluding that Petitioner

was adequately advised of his right to testify by it, given the remarks by the trial judge that were made to *all* criminal defendants who appeared at the January 21, 1988, trial calendar call; but while those remarks indicated in general terms that a defendant could not be "coerced" into testifying, they did not warn Petitioner (or any of the other criminal defendants present) that he could not be "coerced" into *not* testifying, especially given the fact that the trial court encouraged him (and the other defendants), if they had any doubts about the scope of their right to testify, to consult with their attorney. That is what Petitioner did! And his attorney working in tandem with the Court denied Petitioner his right to testify. (6SR-Exh.5B.)

In short, Petitioner's case arguably occurred in the twilight region between the old legal regime and the new, when his fundamental right to testify was allowed to fall between the cracks because of a fatal lack of coordination between trial court and counsel.

C. STANDARD OR SCOPE OF REVIEW

Because the District Court did not hold an evidentiary hearing but merely adopted the findings of the Magistrate after review of the trial record, the Court of Appeals is entitled to review the Decision below *de novo*. *Abdi v. State of Georgia*, 744 F.2d 1500, 1503 n.5 (11thCir. 1984), *cert. denied*, 471 U.S. 1006, 105 S.Ct. 1871 (1985).

III. SUMMARY OF ARGUMENT

With respect to Issues One & Two on this Appeal, concerning whether the Georgia Bribery Statute under which Petitioner was charged and convicted, as now definitively interpreted by the Georgia Supreme Court, and/or the trial court's jury charge, violated Petitioner's First Amendment and Due Process Rights by failing to instruct the jury as to Petitioner's theory of the case or to give the jury any other basis on which they could distinguish a "good" from a "bad" (or corrupt) *influencing* campaign contribution – since the Georgia Bribery Statute made every "influencing" campaign contribution a crime and not just those made with a "corrupt" intent to influence, as was the case in *United States v. Jackson*, 72 F.3d 1370 (9thCir. 1995), *Jackson*, cited by the District Court, supports Petitioner. Adopting the Magistrate Judge's Report and Recommendation, the District Court simply caricatures the argument by Petitioner into a demand that the federal courts import a *quid pro quo* requirement into the Georgia Bribery Statute as a matter of First Amendment Law. That is demonstrably not so. After all, the Petitioner abandoned his request for a *quid pro quo* jury charge in favor of a charge that simply pointed out that valid campaign contributions could be made for the purpose of "influencing" their recipient. Indeed, the Georgia Court of Appeals remanded the case to the trial court for a retrial on that basis, insisting that the trial court give a charge to the jury the next go-round that would acknowledge that there is a need to distinguish between "good" and "bad" *influencing* campaign contributions.

Because the Georgia Supreme Court has now definitively interpreted the Georgia Bribery Statute as requiring no distinction between "good" and "bad" *influencing* campaign contributions, reversing the Georgia Court of Appeals, the combined First Amendment and Due Process considerations of overbreadth/vagueness mandate that the Petitioner's conviction be set aside.

Concerning Issues 3 & 4 of this Appeal, concerning whether or not Petitioner was denied his right to testify and, if so, whether or not he is prevented from raising that claim on *habeas* because of a local procedural default, Petitioner relies on *Nichols v. Butler*, 953 F.2d 1550 (11thCir. 1992) (*en banc*) (*Nichols III*) for the proposition that his right to testify was clearly denied when his trial counsel refused to allow Petitioner to testify at the eleventh hour of the trial on pain of his resigning from the case; whereas, despite failing to raise the right to testify issue in his initial appeal, Petitioner contends under the authority of *Oyola v. Bowers*, 947 F.2d 928, 931-33 (11thCir. 1991) that he is entitled to the benefit of Georgia's more liberal cause-and-prejudice standard, which means that while for federal purposes the basic rule of *Nichols III* has been deemed "not new" under *Teague v. Lane*, 489 U.S. 288 (1989), so that it can be applied retroactively to Petitioner's claim, what is novel about *Nichols III* and what would supply "cause" for Petitioner's earlier default in failing to raise the claim as part of his initial appeal is the new characterization of that claim by *Nichols III* as a "ineffective assistance of counsel claim" rather than a right to testify claim, thus leading the trial court to retroactively and inappropriately apply Georgia's strict default rule for ineffective-assistance-of-counsel claims to

a right-to-testify claim, in a case which would not have been considered ineffective assistance of counsel under Georgia's liberal cause-and-prejudice standard in 1988 when Petitioner's initial appeal was filed.

IV. ARGUMENT

A. AS DEFINITIVELY INTERPRETED BY THE GEORGIA SUPREME COURT AND AS CHARGED BY THE TRIAL COURT, THE GEORGIA BRIBERY STATUTE UNDER WHICH PETITIONER WAS CONVICTED VIOLATED HIS FIRST AMENDMENT RIGHTS, AS WELL AS HIS DUE PROCESS RIGHTS TO HAVE A CHARGE EMBODYING HIS ESSENTIAL DEFENSE DELIVERED TO THE JURY.

The District Court has almost willfully caricatured Petitioner's legal arguments by claiming that he is insisting that the Georgia Bribery Statute be interpreted to contain a *quid pro quo* requirement. On the contrary, Petitioner has happily acknowledged that (i) "the Georgia Supreme Court has now *definitively* interpreted the Georgia Bribery Statute . . . and – using the illustrative federal *Quid Pro Quo* Rule as a scarecrow – concluded that the Bribery Statute as charged required no narrowing," (R1-18-13); and (ii) as a result, "it is too late for this Court to salvage it by application of the normal federal *Quid Pro Quo* Rule." *Id.*

Repeatedly, Petitioner has emphasized that the federal *Quid Pro Quo* Rule was simply *one* approach to narrowing the Georgia Bribery Statute and that the approach taken by the Georgia Court of Appeals, which did *not*

involve adoption of the federal *Quid Pro Quo* Rule, would have sufficed for First Amendment purposes:

> Recognizing its essential duty under the First Amendment, the Court of Appeals did *not* go as far as to adopt the precise *Quid Pro Quo* Rule employed by federal courts in interpreting federal statutes, but it did insist that the trial court acknowledge that a valid campaign contribution could be made to "influence" the recipient – and then left it up to the trial court to decide what additional instructions were necessary to enable jury to differentiate a "good" from a "bad" influencing campaign contribution. At a minimum, the Court of Appeals insisted that the trial court give Petitioner's requests to charge 2, 3, 4, & 8, after adjusting them to the facts of the case. *See Agan I*, 380 S.E.2d at 762-63.
>
> The point is that *some* narrowing construction of the Bribery Statute as charged by the trial court was constitutionally mandated; and, while the decision by the Court of Appeals did not go as far as the *Quid Pro Quo* Rule advocated by Petitioner on appeal, it may well have sufficed to cure the basic First Amendment problem. After all, the Court of Appeals' approach was predicated on Petitioner's own Requests to Charge.

(R1-18-12.)

Accordingly, the District Court is flat wrong when it summarizes Grounds One & Two of the Petition as follows – "Once again [Petitioner] argues [i] that the Georgia Bribery Law, if not limited by the inclusion of a *quid pro quo* element through the Ethics in Government Act, violates the First Amendment" [and (ii) that the trial court's jury charges] "by failing to *so* clarify Georgia's

Bribery Law" [resulted in a denial of his Due Process rights]! (R1-19-5.)

Despite Petitioner's happy acknowledgement that the Georgia Supreme Court has now *definitively* interpreted the Georgia Ethics in Government Act so as not to import a *quid pro quo* requirement into the Georgia Bribery Law in question, the Magistrate proceeded to adopt an unnecessary "finding" to that effect, *see* R1-19-5, and once again erroneously distilled the legal issues presented by Grounds One & Two of the Petition as being whether "the Georgia bribery statute, without such [*quid pro quo*] limitations, offends the First Amendment." *Id.*

As indicated above and below, that is decidedly *not* the question presented by either the Petition or the Appeal.

Nonetheless, having constructed his *quid pro quo* scarecrow, the Magistrate announced to no one's surprise that he has precisely the tool to knock it down. He quickly pointed out that a *quid pro quo* argument "practically identical to petitioner's" was recently rejected by the Ninth Circuit in the case of *United States v. Jackson*, 61 F.3d 1386 (9thCir. 1995). (R1-19-6.)

Quoting from *Jackson*, the Magistrate, without any independent legal analysis, concluded that the First Amendment "does not imply an explicit *quid pro quo* element into every state bribery offense" and hence does not require "an explicit *quid pro quo* instruction." (R1-19-6.) Case closed!

But, just to reiterate, the Magistrate observed that his holding as to Ground One of the Petition "necessarily"

disposed of Petitioner's related Due Process challenge to the jury instructions in Ground Two, as indicated by the analysis of the *Jackson* Court. Likewise, the Magistrate rejected any separate vagueness challenge by the Petitioner to the Georgia Bribery Statute, which might be implicit in Ground One, without separate findings or express reasoning. (R1-19-6.)

Before restating for the Court Petitioner's *actual* First Amendment and Due Process vagueness arguments concerning the Georgia Bribery Law, which do *not* turn on the presence or absence of a *quid pro quo* jury instruction, it is appropriate to make the following observations about the Ninth Circuit's decision in *Jackson*.

First, the *Jackson* decision cited by the Magistrate was vacated and superseded by *United States v. Jackson*, 72 F.3d 1370 (9thCir. 1995).

In both decisions the Ninth Circuit properly gave Jackson's extreme First Amendment argument the back of its hand; but then it spent *many* pages wrestling with the related due process and vagueness issues, which the Magistrate and the District Court here felt were disposed of by the initial First Amendment holding. In short, the Ninth Circuit in *Jackson*, despite finding that the First Amendment does not imply an explicit *quid pro quo* element into every state bribery offense, 72 F.3d at 1376, still carefully considered the jury instructions given by the court and those rejected by the court to see whether or not the instructions actually given "adequately distinguish[ed] bribery from legal [First Amendment] activity," such as making campaign contributions and lobbying. 72 F.3d at 1379 *et seq.*

It also examined whether or not the trial court in instructing a jury that a bribe was something given with "the specific intent *corruptly* to influence the other person in his official capacity" had adequately instructed the jury as to the definition of "corruptly." The court concluded that there was no circularity in the definition of "corruptly," even though intent to violate the law was defined as "intent to do something unlawful." That was because unlawful was in effect defined by the California Bribery Statute as doing something "corruptly"; and the jury was charged that corruptly involved doing something with a "wrongful design." Likewise, the court noted that the trial court had specifically given requested charges to the jury explaining that making campaign contributions was a lawful activity and that lobbying was a lawful activity.

The whole point of Issues One & Two of the present Appeal is that the Georgia Bribery Statute did *not* say that a bribe involved an intent "corruptly to influence" a public official; rather the Georgia Bribery Law specifically prohibited any monies given with the intent to "influence" the recipient in the performance of an official act. Therefore, as the Georgia Court of Appeals agreed, it was absolutely essential that the trial court's instructions include some reasonable effort to distinguish a "good" from a "bad" (or corrupt) *influencing* contribution.

Unlike the California statute involved in *Jackson*, the Georgia Bribery Act, as written and as charged, did not specifically require the jury to find that the alleged bribe had been made with the "corrupt" intent to influence. On the contrary, the pertinent part of the actual charge delivered by the Court on the substantive elements of the

crime, which covered a scant 53 lines and roughly 450 words, (3SR-Exh.1C-Vol.IV-809[1.7]-811[1.9]), went as follows:

> Under Georgia Law a person commits bribery when he gives or offers to give to any person acting for or on behalf of the State or any political subdivision thereof, any benefit, reward or consideration to which he is not entitled, with the purpose of *influencing* him in the performance of any act related to the function of his office or employment.

(3SR-Exh.1C-Vol.IV-809[11.13-20].)

Again, unlike the California Statute in *Jackson*, one searches this language and the language of the Georgia Bribery Statute in vain for any language requiring that the intent to influence be "corrupt."

Earlier in this same charge, when the trial judge charged the jury as to the requisite "criminal intent," he emphasized to the jury that criminal intent is not intent to violate the law; rather, it "means simply to intend to commit the act which is prohibited by a statute." (3SR-Exh.1C-Vol.IV-804[11.18-22].) But the Georgia Bribery Statute in question says that any campaign contribution intended to "influence" the recipient is unlawful, whether or not the intent is corrupt or pursuant to some wrongful design. That is where the First Amendment difficulty arises, as indicated by previous observations by the U. S. Supreme Court that campaign contributions are clearly a source of "real or imagined coercive influence" over the recipients," *Buckley v. Valeo*, 424 U.S. 1, 25, 96 S.Ct. 630, 638 (1976), *see also McCormick v. U.S.*, 500 U.S.

257, 111 S.Ct. 1807, 1816 (1991), and *United States v. Brewster*, 506 S.2d 62, 81 & n.1. (D.C.Cir. 1974) – and as indicated by the requirement by the Georgia Court of Appeals that the trial court on retrial give Petitioner's pretermitted Charge No. 4 as follows:

> A campaign contribution is a payment which *can* reasonably be construed to encourage or influence a public officer holding elected office.

By failing to distinguish between a "good" and a "bad" (or corrupt) influencing contribution and by failing to even acknowledge the obvious fact that a valid "influencing" campaign contribution can and does exist within the limits of applicable campaign finance law, the statute and jury charges in this case present just the sort of vague circularity and failure to distinguish between bribery and protected First Amendment activities, such as campaign contributions and lobbying, that the statute and jury instructions in *Jackson* carefully avoided.

Again, recognizing its essential duty under the First Amendment, the Court of Appeals did *not* go as far as to adopt the *Quid Pro Quo* Rule, but it did insist that the trial court acknowledge that a valid campaign contribution could be made to "influence" the recipient – and then left it up to the trial court to decide what additional instructions would be necessary on retrial to enable jury to differentiate a "good" from a "bad" influencing campaign contribution.

At a minimum the Court of Appeals insisted that the trial court give Petitioner's Requests to Charges Nos. 2, 3, 4, & 8, after adjusting them to the facts of the case. *Agan I*, 380 S.E.2d at 762-63.

Again, pretermitted Charge No. 4 provided as follows:

> A campaign contribution is a payment which *can* reasonably be construed to encourage or influence a public officer holding elected office.

The Georgia Court of Appeals simply acknowledged that short of an explicit *quid pro quo* element, it was nonetheless imperative for the trial court in this case to acknowledge that valid campaign contributions can and do have an implicit purpose of influencing the official actions of the recipients and that, therefore, it would be left up to the trial court to decide how to charge the jury so as to distinguish permissible influencing contributions (which happen every day) from "corrupt" influencing contributions (for which one can go to jail). That is what the charge in *Jackson* specifically attempted to do, but what the charge in *Agan* obviously failed to do. And yet, it was absolutely crucial for the charge in *Agan* to do so, since the Statute itself failed to require that the intent to influence be "corrupt."

Of course, since the Georgia Supreme Court reversed the Court of Appeals and revoked its invitation to the trial judge to give the Georgia Bribery Statute a narrowing and saving construction, Petitioner's conviction must be reversed and he cannot be retried.

To be sure, the defendant in *Jackson* did emphasize the *quid pro quo* element in his facial attack on the California statute. That was so because his "as applied" challenge to the effect that legitimate First Amendment campaign contributions or lobbying efforts on his part had been unfairly criminalized by virtue of the vague

statute ran afoul of certain wire tap recordings, which included a "remarkably frank recognition" by Jackson and the man he bribed of their past crimes, of the current arrangement, and of their need to avoid future federal investigation into their conduct, so that the Ninth Circuit found that the jury was free to "take Jackson at his word" and not believe him when he said he had his fingers crossed. 72 F.3d at 1381 & 1386.

By contrast, this case presents the realistic possibility that Petitioner should be taken at his word, since the wire taps in this case revealed that he expressly told the two County Commissioners in question that he was engaged in legitimate campaign contribution/lobbying activity and did not want them to be under any impermissible obligation and that he expressly was not seeking any sort of *quid pro quo*. But the charge to the jury prevented them from taking Petitioner at his word!

As the Record reveals, the State's evidence against Petitioner indicates that from the time of his critical June 9, 1987, meeting with Commissioner Fletcher to the time of his July 21, 1987, payments to Commissioner Lanier, he continually spoke in terms of making "campaign contributions" to them that were *not contingent* on any future help. Carefully following the letter of his attorney's advice, Petitioner in his July 6, 1987, meeting with Commissioner Fletcher reiterated "I don't want you to be under [any] pressure." (3SR-Exh.1C-Vol.IV-903-Exh.24A-8.) Furthermore, in the transcript of his July 21, 1987 meeting with Commissioner Lanier, which (like the earlier meeting with Fletcher) was secretly videotaped by the State, Petitioner responded as follows to the question

from Lanier, "What do you, what is it you want for this contribution?":

> Nothing. Not a thing. That's one thing I want to make clear. Nothing. Because I appreciate what you have done for me so far previously. . . .

(3SR-Exh.1C-Vol.IV-896-Exh.18A-23.)

* * *

Respectfully submitted this 24th day of April, 1996.

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Appellant

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

RAMSEY AGAN	)	
	)	CIVIL ACTION NO.
VERSUS	)	1:95-CV-1162-WCO
	)	
JAMES VAUGHN	)	

ORDER

(Filed Dec. 20, 1995)

The captioned case is before the court for consideration of the magistrate judge's report and recommendation, recommending that the petition for a writ of *habeas corpus* be denied [19-1]. Petitioner filed an objection on December 5, 1995.

The court finds that the report and recommendation is correct as both a matter of law and fact. The report and recommendation contains a thorough legal analysis and factual discussion, and there is no need to repeat those in this order. Petitioner's objections do not offer any viable basis upon which to question the propriety of the magistrate judge's conclusions.

Accordingly, after careful consideration, the magistrate judge's report and recommendation is hereby ADOPTED as the order of the court [19-1]. The petition for a writ of *habeas corpus* is hereby DENIED [1-1].

IT IS SO ORDERED this 20th day of December, 1995.

/s/ William C. O'Kelley
William C. O'Kelley
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORIGA
ATLANTA DIVISION

RAMSEY AGAN	:	CIVIL ACTION NO. 1:95-
VERSUS	:	CV-1162-WCO
	:	
JAMES VAUGHN	:	

ORDER

(Filed Febr. 27, 1996)

The captioned case is before the court for consideration of petitioner's petition for a certificate of probable cause for appeal [26-1]. This court entered an order denying the petition for a writ of habeas corpus and adopting the magistrate judge's report and recommendation on December 20, 1995.

Federal Rule of Appellate Procedure 22(b) states:

> In a habeas corpus proceeding in which the detention complained of arises out of process issued by a state court, an appeal by the applicant for the writ may not proceed unless a district or a circuit judge issues a certificate of probable cause. If an appeal is taken by the applicant, the district judge who rendered the judgment shall either issue a certificate of probable cause or state the reasons why such certificate should not issue. The certificate or the statement shall be forwarded to the court of appeals with the notice of appeal and the file of

> the proceedings in the district court. If the district judge has denied the certificate, the applicant for the writ may then request issuance of the certificate by a circuit judge. . . .

This rule was promulgated pursuant to 28 U.S.C. § 2253.

The issuance of a certificate of probable cause does not require the district court to forecast the petitioner's ultimate success on the merits. To do so would be both cumulative and illogical, in that the court has already evaluated the case on its merits in denying the petition for a writ of habeas corpus. Rather, the petitioner "must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues other than this Court has. . . . " *Gordon v. Willis*, 516 F.Supp. 911, 913 (N.D.Ga. 1980) (Murphy, J.) (emphasis in original) (citations omitted). Of course, petitioner must still make "a substantial showing of a denial of a federal right." *Sawyers v. Collins*, 986 F.2d 1493, 1497 (5th Cir.), *reh'g denied*, 992 F.2d 1493, *cert. denied*, 113 S.Ct. 2405 (1993) (*citing Barefoot v. Estelle*, 463 U.S. 880, 893 (1983)).

The court finds that petitioner is able to make the requisite showing to warrant the issuance of a certificate of probable cause. While not questioning the propriety of the order denying the habeas petition, the court recognizes that constitutional questions in the realm of criminal procedure are open to differing interpretations. Accordingly, it is hereby ordered that petitioner's motion for the issuance of a certificate of probable cause to appeal the denial of the petition for a writ of habeas corpus is GRANTED [26-1].

IT IS SO ORDERED this 27th day of February, 1996.

/s/ William C. O'Kelley
William C. O'Kelley
United States
District Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

RAMSEY AGAN,	)	CIVIL ACTION
Petitioner,	)	NO. 1:95-CV-1162-WCO
vs.	)	HABEAS CORPUS
JAMES VAUGHN, Warden,	)	28 U.S.C. § 2254
Respondent.	)	

ORDER FOR SERVICE OF REPORT AND RECOMMENDATION

(Filed Nov. 13, 1995)

Attached is the report and recommendation of the United States Magistrate Judge made in this action in accordance with 28 U.S.C. § 636 and this Court's Local Rule 260-3. Let the same be filed and a copy, together with a copy of this Order, be served upon counsel for the parties.

Pursuant to 28 U.S.C. § 636(b)(1), each party may file written objections, if any, to the report and recommendation within ten (10) days of the receipt of this Order. Should objections be filed, they shall specify with particularity the alleged error or errors made (including reference by page number to the transcript if applicable) and shall be served upon the opposing party. The party filing objections will be responsible for obtaining and filing the transcript of any evidentiary hearing for review by the district court. If no objections are filed, the report and

recommendation may be adopted as the opinion and order of the district court and any appellate review of factual findings will be limited to a plain error review. *United States v. Slay*, 714 F.2d 1093 (11th Cir. 1983), *cert. denied*, 464 U.S. 1050, 104 S.Ct. 729, 79 L.Ed.2d 189 (1984).

The Clerk is directed to submit the report and recommendation with objections, if any, to the district court after expiration of the above time period.

IT IS SO ORDERED, this 9th day of November, 1995.

/s/ William L. Harper
WILLIAM L. HARPER
UNITED STATES
MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

RAMSEY AGAN, Petitioner, vs. JAMES VAUGHN, Warden, Respondent.	)	CIVIL ACTION NO. 1:95-CV-1162-WCO HABEAS CORPUS 28 U.S.C. § 2254

MAGISTRATE JUDGE'S ORDER,
REPORT AND RECOMMENDATION

(Filed Nov. 13, 1995)

Petitioner, a state inmate currently incarcerated at the Scott Correctional Institute in Hardwick, Georgia, filed his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 on May 5, 1995. (Docket No. 1). For the reasons set forth below, the undersigned Magistrate Judge hereby RECOMMENDS that petitioner's petition be DENIED.

The facts surrounding defendant's criminal conduct were briefly summarized by the Supreme Court of Georgia as follows:

> Agan, the Honorary Turkish Consul in Atlanta, sought a building height variance for the construction of a hotel on his property. Agan and Sarper, an Emory University professor, had discussed with officials of the Emory Medical Clinic a plan to bring Turkish patients to the Clinic who would stay at the hotel. The DeKalb county commission had twice rejected Agan's

application for a variance. Agan submitted a third application, and spoke with two DeKalb County commissioners, Lanier and Fletcher, inquiring what Agan could do to insure the approval of his application. Agan told Fletcher he had a number of friends in the local Turkish-American Association who wished to contribute to Fletcher's campaign. At a meeting between Agan and Fletcher, Agan urged Fletcher to support the variance application, then left Fletcher with four checks totaling $3,700.00, made to Fletcher personally, and marked "for campaign contribution," despite Fletcher's protests that he did not even have a campaign bank account. The checks were drawn on the accounts of Sarper and three others who testified they were reimbursed for the checks by Agan and believed Agan wanted contributions to come from different people in order to give the impression he enjoyed broad support in the Turkish community. After another meeting between Agan and Fletcher in which Agan reiterated his need for the variance, Agan presented Fletcher with a fifth check for $800.00 marked as a campaign contribution, from a third party. Agan, accompanied by Sarper, also met with Lanier to discuss the variance. As they left Lanier's office, Sarper gave Agan an envelope at Agan's request and, back in Lanier's office, without Sarper, Agan presented Lanier with the envelope containing Sarper's check to Lanier for $3,000.00 marked "campaign contribution," despite Lanier's statement to him that he was not up for reelection for three years.

State v. Agan, 259 Ga. 541, 384 S.E.2d 863, 864-65 (1989), *cert. denied, Agan v. Georgia*, 494 U.S. 1057, 110 S.Ct. 1526, 108 L.Ed.2d 765 (1990).

Based upon these facts, defendant was convicted of bribery of public officials as then defined by O.C.G.A. § 16-10-2(a)(1) in the Superior Court of DeKalb County on January 29, 1988. Defendant received a seven year sentence, with three years to serve.

Defendant's conviction was reversed upon direct appeal to the Georgia Court of Appeals in *Agan v. State*, 191 Ga. App. 92, 380 S.E.2d 757 (1989). In reversing the trial court, the appellate court held that the trial court had committed error in failing to interpret Georgia's bribery statute in light of Georgia's Ethics in Government Act, O.C.G.A. § 21-5-1, *et seq.*, and failing to so instruct the jury. The appellate court also found that the trial court had wrongly admitted into evidence $7,500.00 in United States currency. Finally, the appellate court found that the trial court had committed error in denying defendant a hearing on his motion to dismiss for selective prosecution.[1]

The Georgia Court of Appeals was in turn generally reversed by the Supreme Court of Georgia. *State v. Agan, supra*. However, the court did agree that error had been committed in denying defendant an evidentiary hearing with regard to his motion to dismiss, and the matter was remanded to the trial court for purposes of conducting an evidentiary hearing, with the court noting that defendant's conviction would stand if defendant was unsuccessful at the evidentiary hearing, but that defendant's

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[1] The Georgia Court of Appeals additionally reversed co-defendant Sarper's conviction finding insufficient evidence to support this verdict.

success at this hearing would result in his conviction being vacated.

Upon remand, and following an evidentiary hearing, the trial court once again denied defendant's motion to dismiss based upon selective prosecution. This determination was affirmed upon direct appeal by the Georgia Court of Appeals, *Agan v. State*, 203 Ga. App. 363, 417 S.E.2d 156 (1992), and was in turn upheld by the Supreme Court of Georgia in *Agan v. State*, 262 Ga. 783, 426 S.E.2d 552 (1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 74, 126 L.Ed.2d 43 (1993).

In his present petition, petitioner raises several grounds in support of his request for relief. Each of these grounds is considered separately below.

In his petition, petitioner once again argues that the Georgia bribery law, if not limited by the inclusion of a *quid pro quo* element through the Ethics in Government Act, violates the First Amendment to the United States Constitution. In a closely related argument, petitioner claims that the trial count's jury charges, by failing to so clarify Georgia's bribery law, resulted in a denial of his due process rights. For the reasons set forth below, the undersigned finds this argument unpersuasive.

Initially, the undersigned notes that interpretation of state law is generally the state's prerogative. Accordingly, a state's supreme court's construction of its own state's laws generally provides no basis for federal habeas relief. *See, e.g., McCullough v. Singletary*, 967 F.2d 530, 535 (11th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1423, 122 L.Ed.2d 792 (1993); *Beverly v. Jones*, 854 F.2d 412, 416 (11th Cir. 1988). In the present case, the Supreme Court of

Georgia has held that the Ethics in Government Act "has in no manner altered the bribery statute." *Agan*, 384 S.E2d at 866. This interpretation of state law is binding upon this court.

Having found that the Ethics in Government Act neither altered the definition of "entitlement" contained within Georgia's bribery statute nor imparted within this statute an implicit *quid pro quo* requirement, the undersigned turns to consider whether the Georgia bribery statute, without such limitations, offends the First Amendment. An argument practically identical to petitioner's was recently rejected in a persuasive opinion by the Ninth Circuit Court of Appeals in *United States v. Jackson*, 61 F.3d 1386 (9th Cir. 1995). In that case, the court determined that the First Amendment "does not imply an explicit *quid pro quo* element into every state bribery offense," that the state bribery law therefore "does not imply an explicit *quid pro quo* instruction," and accordingly that "the absence of one here cannot constitute error." *Jackson*, 1995 U.S. App. LEXIS 19350 at p. 12. The undersigned concurs with this court's reasoned opinion, and accordingly rejects petitioner's First Amendment challenge to Georgia's bribery statute. Furthermore, to the extent that petitioner raises a separate challenge to Georgia's bribery statute as unconstitutionally vague, the undersigned likewise rejects this argument. *See, e.g., Agan*, 384 S.E.2d at 867; *King v. State*, 246 Ga. 386, 387-88, 271 S.E.2d 630 (1980).

This holding necessarily is dispositive of petitioner's closely related due process challenge to the jury instructions at his trial. As noted by the court in *Watson v. Dugger*, 945 F.2d 367, 371 (11th Cir. 1991), where a due

process claim is raised based upon a state court's failure to give a requested jury instruction beyond those standard instructions necessary for the statement of the charged offense, this claim may only succeed where the failure to provide such additional instructions "make the trial 'fundamentally unfair.' " For the reasons set forth above, the undersigned finds that petitioner's proposed jury instruction which were rejected by the trial court would not have constituted a proper statement of Georgia state law. Furthermore, while the undersigned agrees with the Supreme Court of Georgia that the instructions given by the trial court in the present case were not a model of clarity, the undersigned finds that these instructions were not so deficient as to constitute a violation of constitutional principles of due process.

In a closely related claim, petitioner challenges his conviction, arguing that the evidence was constitutionally insufficient to establish the existence of a *quid pro quo* element to his charged bribery offense. However, as the undersigned has determined that no such element exists under Georgia's bribery law, petitioner's claim must necessarily fail.

Next petitioner claims that his conviction must be set aside based upon the trial court's denial of his motion to dismiss for selective prosecution. The undersigned disagrees.

In order to prevail upon his claim of selective prosecution, petitioner bears the heavy burden of establishing both that other similarly situated individuals who have committed the same offense have not been prosecuted, and that the selection of petitioner for prosecution was

"constitutionally invidious." *See, e.g., Owen v. Wainwright*, 806 F.2d 1519, 1523 (11th Cir. 1986); *United States v. Lichenstein*, 610 F.2d 1272, 1281 (5th Cir. 1980). Upon remand, the trial court conducted an evidentiary hearing pursuant to petitioner's motion, finding that petitioner had failed to meet his burden of proof. Upon direct appeal, the Georgia Court of Appeals affirmed the trial court's determination, finding that petitioner had failed to establish either of the two required prongs of his selective prosecution argument. *Agan*, 417 S.E.2d at 158-59.

Regardless of the issue of whether petitioner had established the existence of similarly situated individuals who have escaped prosecution for the same offense, the undersigned finds that petitioner has clearly failed to satisfy the "invidiousness" prong of the selective prosecution analysis. Petitioner attempts to satisfy this prong in two ways. First, petitioner contends that the commissioners who reported petitioner's alleged wrong-doing to the prosecuting attorney's office were motivated by discriminatory aminus. Even if petitioner had established this fact by probative evidence, the undersigned notes that petitioner has produced absolutely no evidence tending to suggest that the prosecuting attorney, who made the ultimate decision to prosecute him, shared this animus. Given these facts, no selective prosecution defense is stated, as the focus of such an inquiry must rest upon the individual making the ultimate determination to prosecute. *See, e.g., United States v. Gomez-Lopez*, 62 F.3d 304, 1995 U.S. App. LEXIS 20620 at pp.6-7 (9th Cir. 1995); *United States v. Greene*, 698 F.2d 1364 (9th Cir. 1983). Second, petitioner argues that his conduct in providing campaign contributions to the commissioner constituted

an exercise of his constitutional rights under the First Amendment, and that his prosecution was therefore necessarily motivated by his exercise of this right. This argument, however, is patently frivolous. For the reasons set forth above, the undersigned finds that petitioner's conduct was not constitutionally protected. In any event, the crux of petitioner's own argument is that other individuals engaging in the same allegedly protected conduct were not prosecuted. Under such circumstances, the undersigned finds that petitioner has clearly failed to demonstrate that his prosecution was the result of his exercise of his constitutionally protected rights. As petitioner has failed to satisfy the second prong of this analysis, his selective prosecution claim must fail.

Finally, defendant argues that he was denied the opportunity to testify at his own trial despite his wish to do so by the actions of his counsel, and that this fact establishes both a denial of petitioner's fundamental right to testify as well as a denial of petitioner's right to effective assistance of counsel. The undersigned notes that this particular claim was not included within petitioner's original motion for a new trial, nor was it included within petitioner's first direct appeal of his conviction to the Georgia Court of Appeals. Instead, this claim was first raised on June 6, 1991, when petitioner filed an extraordinary motion for a new trial pending the Georgia Court of Appeals' review of the trial court's denial of his motion to dismiss for selective prosecution. Based upon these facts, respondent urges that petitioner's claim is procedurally defaulted. Petitioner's claim was in fact rejected by the state court on this basis.

The Eleventh Circuit Court of Appeals has repeatedly held that a federal district court should defer to a state court's finding of procedural default absent a demonstration of cause and prejudice by petitioner. *See, e.g., Morris v. Kemp*, 809 F.2d 1499 (11th Cir. 1987), *cert. denied*, 482 U.S. 907, 107 S.Ct. 2486, 96 L.Ed.2d 378 (1987). In the present case, petitioner urges that cause exists to excuse his procedural default based upon a substantial change in the law. Specifically, petitioner refers to the court's decision in *Nichols v. Butler*, 917 F.2d 518 (11th Cir. 1990), *vacated*, 932 F.2d 900 (1991). In referring to this decision, as well as the court's decision upon rehearing, *Nichols v. Butler*, 953 F.2d 1550 (11th Cir. 1992), petitioner argues that the rule of law stated in this authority is sufficiently novel to excuse his earlier procedural default because of its characterization of a denial of right to testify as an ineffective assistance of counsel claim.

The undersigned finds petitioner's argument entirely unpersuasive. Clearly, cause may be established upon a demonstration that the "constitutional claim is so novel that its legal basis is not reasonably available to counsel." *Dugger v. Adams*, 489 U.S. 401, 407, 109 S.Ct. 1211, 103 L.Ed.2d 435 (1989) (*quoting, Reed v. Ross*, 466 U.S. 1, 13 (1984)). However, the undersigned finds that authority clearly existed in this circuit prior to the date of defendant's conviction both for the principle that petitioner's right to testify may not be waived by counsel but instead must be waived personally if at all, and that actions by counsel which serve to deny a defendant of his right to testify constitutes ineffective assistance of counsel. *See, e.g., Danner v. United States*, 820 F.2d 1166, 1170 n.4 (11th Cir. 1987), *cert. denied*, 484 U.S. 1012, 108 S.Ct. 713, 98

L.Ed.2d 663 (1988); *Wright v. Estelle*, 572 F.2d 1071 (5th Cir. 1978); *Winters v. Cook*, 489 F.2d 174, 179-80 (5th Cir. 1973); *Young v. Zant*, 506 F.Supp. 274, 279-80 (M.D. Ga. 1980), *reversed in part on other grounds*, 677 F.2d 792 (11th Cir. 1982). Finding that petitioner's claim of a denial of his right to testify, or in the alternative for denial of his right of effective assistance of counsel, could not be deemed novel at the time of his conviction, the undersigned finds that petitioner has failed to establish cause to excuse his procedural default. *See, United States ex. rel. Stanley v. O'Leary*, 1987 U.S. Dist. LEXIS 6748 at pp. 15-16 (N.D. Ill. 1987), *aff'd without opinion*, 870 F.2d 659 (7th Cir. 1989).

Based upon the above discussion, the undersigned Magistrate Judge finds that each ground offered in support of petitioner's petition for a writ of habeas corpus is without merit. Accordingly, the undersigned hereby RECOMMENDS that petitioner's petition be DENIED.

The undersigned also notes that petitioner has also filed a motion for reconsideration, asking the undersigned to reconsider his order limiting petitioner's reply brief in this matter to 25 pages (Docket No.17). Petitioner indicates that he did not file an initial brief along with his petition so that his reply brief "is in effect the first and only Brief to be filed by Petitioner in connection with the pending matter." (Docket No. 17, p.2). The undersigned finds this statement somewhat misleading based upon petitioner's attachment of 51 pages of factual explanation of the four grounds of his habeas corpus petition when it was originally filed. In any event, petitioner's motion for reconsideration is hereby DENIED.

IT IS SO ORDERED, REPORTED AND RECOMMENDED, this 9th day of November, 1995.

/s/ William L. Harper
WILLIAM L. HARPER

UNITED STATES
MAGISTRATE JUDGE

APPENDIX G

396 S.E.2d 610

196 Ga.App. 263

AGAN et al.

v.

The STATE.

No. 77533.
Court of Appeals of Georgia.
July 9, 1990.

SOGNIER, Judge.

In State v. Agan, 259 Ga. 541, 384 S.E.2d 863 (1989), the Supreme Court affirmed in part and reversed in part the judgment of this court in Agan v. State, 191 Ga.App. 92, 380 S.E.2d 757 (1989). Accordingly, our judgment in this case is vacated, the judgment of the Supreme Court is made the judgment of this court, and the judgment of the trial court is affirmed in part, reversed in part, and remanded for further proceeding consistent with the Supreme Court's opinion.

Judgment affirmed in part and reversed in part and case remanded.

CARLEY, C.J., DEEN, McMURRAY and BANKE, P.JJ., and BIRDSONG, POPE, BEASLEY and COOPER, JJ., concur.

APPENDIX H

384 S.E.2d 863

259 Ga. 541

The STATE

v.

AGAN et al.

No. 46967
Supreme Court of Georgia
October 26, 1989

HUNT, Justice.

We granted certiorari to the Court of Appeals in *Agan v. State*, 191 Ga. App. 92 (380 SE2d 757) (1989) to review that opinion, with emphasis upon "[t]he correct interpretation of the offering of a bribe, as prohibited by OCGA § 16-10-2(a)(1), and the acceptance of a 'campaign contribution,' as defined in OCGA § 21-5-3(6)."

The facts, more fully set forth in the Court of Appeals' opinion, are summarized as follows. Agan, the Honorary Turkish Consul in Atlanta, sought a building height variance for the construction of a hotel on his property. Agan and Sarper, an Emory University professor, had discussed with officials of the Emory Medical Clinic a plan to bring Turkish patients to the Clinic who would stay at the hotel. The Dekalb [sic] County Commission had twice rejected Agan's application for a variance. Agan submitted a third application, and spoke with two Dekalb [sic] County commissioners, Lanier and Fletcher, inquiring what Agan could do to insure the approval of his application. Agan told Fletcher he had a

number of friends in the local Turkish-American Association who wished to contribute to Fletcher's campaign. At a meeting between Agan and Fletcher, Agan urged Fletcher to support the variance application, then left Fletcher with four checks totaling $3,700.00, made to Fletcher personally, and marked "for campaign contribution," despite Fletcher's protests that he did not even have a campaign bank account. The checks were drawn on the accounts of Sarper and three others who testified they were reimbursed for the checks by Agan and believed Agan wanted contributions to come from different people in order to give the impression he enjoyed broad support in the Turkish community. After another meeting between Agan and Fletcher in which Agan reiterated his need for the variance, Agan presented Fletcher with a fifth check for $800.00 marked as a campaign contribution, from a third party. Agan, accompanied by Sarper, also met with Lanier to discuss the variance. As they left Lanier's office, Sarper gave Agan an envelope at Agan's request and, back in Lanier's office, without Sarper, Agan presented Lanier with the envelope containing Sarper's check to Lanier for $3,000.00 marked "campaign contribution," despite Lanier's statement to him that he was not up for re-election for three years. The Court of Appeals, on appeal from Sarper and Agan's convictions for bribery, ordered a new trial for Agan, and vacated Sarper's conviction for insufficient evidence.

Sufficiency of the Evidence

1(a). The Court of Appeals correctly determined under the standard established by *Jackson v. Virginia*, 443 US 307 (99 SC 2781, 61 LE2d 560) (1979), that a rational

trier of fact could have found the essential elements of the crime of bribery to have been established beyond a reasonable doubt in regard to Agan. There was ample evidence at trial that Agan gave payments to Lanier and Fletcher for the specific purpose of influencing their votes on his application for a building height variance, thus committing the crime of bribery. See Division 2(a) below.

1(b). We decline to review the Court of Appeals' holding that the evidence against Sarper was insufficient to support the verdict of guilty. See our Rule 30(1).

The Charge

2(a). The state contends the Court of Appeals erred in holding the trial court's charge constituted reversible error. The trial court charged the jury on the definition of the offense of bribery as set forth in OCGA § 16-10-2(a)(1), which provides that:

> "[a] person commits the offense of bribery when . . . [h]e gives or offers to give to any person acting for or on behalf of the state or any political subdivision thereof . . . any benefit, reward, or consideration to which he is not entitled with the purpose of influencing him in the performance of any act related to the functions of his office."

The trial judge then stated to the jury that "the word 'entitled' does not have any specific or extraordinary or particular legal terminology or definition. I will charge you the word 'entitle' means to give a deed or title to." Regarding the Ethics in Government Act, OCGA § 21-5-1 et seq., the court charged:

> A campaign contribution means a gift, an advance or deposit of money or anything of value, conveyed or transferred for the purposes of influencing the nomination for election or election of any person for office. . . . [A] campaign contribution, as I have just defined for you, can be made directly to the candidate . . . [U]nder Georgia Law campaign contributions can be made for use in future campaigns for elective office . . . : [I]t is not the use to which the money may be put, but it is the purpose for which the money was paid that controls."

2(b). The Court of Appeals found the trial court's charge faulty for failing to read the bribery statute, OCGA § 16-10-2, in conjunction with the Ethics in Government Act, OCGA § 21-5-1 et seq., which defines political contributions and sets forth the manner in which they may be received and reported. In particular, the Court of Appeals held the language of the bribery statute prohibiting the giving or offering to a public officer of a benefit to which that officer *"is not entitled,"* is to be read very narrowly to proscribe the giving or offering to a public official of a benefit to which that officer *"is not qualified or privileged to receive or has no grounds or right to seek, request or receive."* 191 Ga. App. at p. 97. [Emphasis supplied]. The Court of Appeals further held

> a campaign contribution, whether made to a candidate in the heat of a campaign or to encourage or influence the official after he is elected, is something which a candidate or elected official is qualified or privileged to request or receive and thus something to which he is "entitled" within the meaning of OCGA § 1610-2.

191 Ga. App. at p. 98. We interpret this holding as meaning, in effect, that if money given to an office holder qualifies as a campaign contribution, requiring reporting under the Ethics in Government Act, OCGA § 21-5-1 et seq., then it cannot be a bribe. With this conclusion we respectfully disagree.

The Ethics in Government Act has in no manner altered the bribery statute. The Act simply defines a campaign contribution[1] and, having defined, requires

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[1] The term "contribution" is defined in OCGA § 21-5-3(6) as follows:

> 'Contribution' means a gift, subscription, membership, loan, forgiveness of debt, advance or deposit of money or anything of value conveyed or transferred for the purpose of influencing the nomination for election or election of any person for office, bringing about the recall of a public officer holding elective office or opposing the recall of a public officer holding elective office, or the influencing of voter approval or rejection of a proposed constitutional amendment, a state-wide referendum, or a proposed question which is to appear on the ballot in any county or municipal election. The term specifically shall not include the value of personal services performed by persons who serve without compensation from any sources and on a voluntary basis. The term 'contribution' shall include other forms of payment made to candidates for office or who hold office when such fees and compensation made can be reasonably construed as a campaign contribution designed to encourage or influence a candidate or public officer holding elective office.

Although portions of the foregoing language might be read to authorize bribery of a candidate for public officer [sic], we decline to

disclosure. Specifically, nothing in the Act permits a public office holder to request or receive anything of value "to

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interpret the statute to reach such an absurd result. An explanation for the somewhat inartful language of the statute may be found in its legislative history. The predecessor statute to the Ethics in Government Act (the Financial Disclosure Act, Ga. L. 1974, pp. 155 et seq.) defined "contribution" as follows:

" 'Contribution' means a gift, subscription, loan, forgiveness of debt, advance or deposit of money or anything of value conveyed or transferred for the purpose of influencing the nomination for election or election of any person for the offices provided for in section 2." Ga. L. 1974, p. 155.

The following year, the act was amended to provide:

" 'Contribution' means a gift, subscription, loan, forgiveness of debt, advance or deposit of money or anything of value conveyed or transferred for the purpose of influencing the nomination for election or election of any person for the offices provided for in section 2, but the term specifically shall not include the value of personal services performed by persons who serve without compensation from any source and on a voluntary basis. 'Contribution' shall include retained fees, fees or any other form of payment made to candidates for office or who hold office when such fees and compensation made can be reasonably construed as a campaign contribution designed to encourage or influence the candidate or office holder to introduce legislation which enriches the person, company, corporation or other entity which made the contribution. Introduction of such enriching legislation by the candidate subsequent to his election to office shall be prima facie evidence that the fee, compensation or retainer fee was a campaign contribution under the meaning of this Act." Ga. L. 1975, p. 1122-23.

The Ethics in Government Act carried forward the substance of this definition, but removed the words that restricted the term "influence" to influencing the introduction of enriching legislation. We view this not as an attempt to restrict the definition of a *bribe*, but as a manner of enlarging the

which he is not entitled with the purpose of influencing him in the performance of any act related to the functions of his office or employment. . . . " (OCGA § 16-10-2 (a)). Nor is the term "entitled," as contained in the bribery statute, modified in any way by the Ethics in Government Act. Other than those emoluments of public office that are expressly authorized and established by law, no holder of public office is entitled to request or receive – from any source, directly or indirectly – anything of value in exchange for the performance of any act related to the functions of that office.[2]

As noted above, the Court of Appeals found the trial court's definition of the term "entitled" misleading because it failed to inform the jury that a public official is entitled to receive campaign contributions. Although we reverse this holding, we note the trial court's charge on the meaning of "entitled," see Division 2(a) above, was somewhat inapt. However, because the more appropriate meaning of "entitled" is more restrictive than the definition given by the trial court, we view any error as helpful to the accused, and harmless.

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definition of a *contribution* so as to insure the reporting of most all transfers to the candidate or office holder.

[2] Our holding means that a transfer that is a bribe as defined by OCGA § 16-10-2 also may come within the definition of "contribution" as contained in the third sentence of OCGA § 21-5-3 (6). The fact that such a transfer must be reported does not change its character as a bribe.

Constitutionality of the Bribery Statute

Vagueness Challenge

3. We find no merit to Agan's contention that OCGA § 16-10-2(a) is unconstitutionally vague, hence void. A similar contention was rejected in *King v. State*, 246 Ga. 386, 387-388 (271 SE2d 630) (1980), as follows:

> Bribery is a well-known word, used widely and understood generally. Its ordinary signification may mean an " 'act of influencing the action of another by corrupt inducement.' . . . [cit.]"

First Amendment Challenge

4. Agan contends the bribery statute must be interpreted as condemning only a payment to a public officer who agrees to a clearly delineated *quid quo pro*, [sic] i.e., an explicit purchase of an explicit official act. Were that not so, he insists, the bribery statute would be an impermissible restraint upon free speech under the First Amendment to the Constitution of the United States. He relies principally upon *Buckley v. Valeo*, 424 US 1 (96 SC 612, 46 LE2d 659) (1976).

In *Buckley*, the Supreme Court examined the application of the First Amendment to limitations upon campaign expenditures by a candidate for public office, and limitations upon amounts that might be contributed to a campaign, finding a violation of the right of free speech for the former, and none for the latter. The holdings in *Buckley* do not apply to the bribery statute, which places no limitation upon *amounts* of contributions or expenditures, but, rather, restricts the *purposes* for which any "benefit, reward or consideration" may be offered or given to, or solicited or accepted by, a public officer. Even assuming the First Amendment might

relate to the purposes of political transfers, it cannot be understood to shield the bribing of a public officer.[3]

Citizens of Georgia have every right to try to influence their public officers – through petition and protest, promises of political support and threats of political reprisal. They do not have, nor have they ever had, the "right" to buy the official act of a public officer. OCGA § 16-10-2(a). Public officers are not prohibited from

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[3] "Where the letter of the statute results in absurdity or injustice or would lead to contradictions, the meaning of general language may be restrained by the spirit or reason of the statute." *Sirmans v. Sirmans*, 222 Ga. 202, 204 (149 SE2d 101) (1966). That logic should apply alike to all legal authorities, including the Constitution.

We decline to follow the "rule," as urged by Agan, of *People v. Brandstetter*, 103 Ill. App. 3d 259 (430 NE2d 731) (1982), that: "[P]ublic officials are 'authorized by law' to receive campaign contributions from those who might seek to influence the candidate's performance as long as no promise for or performance of a specific official act is given in exchange." *Id.*, at 736. In that case, a political activist was convicted of bribery for handing to a state legislator a note that read: "Mr. ___, the offer for help in your election & $1000 for your campaign for Pro ERA vote."

While Brandstetter's conviction was affirmed on appeal, we are concerned that its "rule" would proliferate corrupt practices. As example, note this story in *The Atlanta Journal and Constitution* of July 8, 1989: "A millionaire who handed out $10,000 checks on the [Texas] Senate floor while legislation that interested him was pending said the checks were political contributions, not an attempt to bribe lawmakers. 'It would be difficult to make it into a bribery case,' said [the district attorney], who believes it's time to change Texas's loose campaign finance laws. 'In Texas, it's almost impossible to bribe a public official as long as you report it. . . . ' "

receiving legitimate financial aid in support of nomination or election to public office. They do *not* have, nor have they ever had, the "right" to sell the powers of their offices.[4] OCGA § 16-10-2 (b). The bribery statute does not serve to weaken free speech. It serves to strengthen free government.

The Display of Currency

5. We need not determine the propriety of the admission into evidence of currency obtained through the cashing of checks and the district attorney's display of

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[4] The acceptance of a bribe is an egregious conflict of interest, and will vitiate official acts that otherwise appear to be lawful. "When neighbors of rezoned property challenge the rezoning in court on its merits, it will be set aside only if fraud or corruption is shown or the rezoning power is being manifestly abused to the oppression of the neighbors." *Cross v. Hall County*, 238 Ga. 709, 711 (235 SE2d 379) (1977). For recent cases on conflicts of interest, see *Dunaway v. City of Marietta*, 251 Ga. 727 (308 SE2d 823) (1983); *Wyman v. Popham*, 252 Ga. 247 (312 SE2d 795) (1984); *Brooks v. Dept. of Transportation*, 254 Ga. 303 (4) (328 SE2d 705) (1985); and *Vickers v. Coffee County*, 255 Ga. 659 (340 SE2d 585) (1986). See also *Olley Valley Estates v. Fussell*, 232 Ga. 779, 784-785 (208 SE2d 801) (1977): "[W]here self-interested voting has been alleged, the usual rule of only limited review of zoning decisions is abrogated, and judicial inquiry into all the pertinent surrounding circumstances is proper, and this is true whether or not the question of the commissioner's possible bias was raised at the zoning hearing."

Criminal sanctions attached to bribery inhere to the prosecutorial authority of the district attorney. Civil sanctions, as exemplified by the cases cited in this note, lie to an aggrieved citizen, that is, to one who has suffered "substantial damage to a substantial interest". *Brand v. Wilson*, 252 Ga. 416, 417 (314 SE2d 192) (1985).

that currency. The error, if any, was not so harmful as to require reversal under the standard of *Johnson v. State*, 238 Ga. 59, 61 (230 SE2d 869) (1976).

Selective Prosecution

6. The state contends error in the Court of Appeals' holding that the trial court applied an incorrect standard in denying Agan and Sarper an evidentiary hearing on their selective prosecution defense. The majority held the defendants would be entitled to a hearing on their showing of "colorable entitlement" to that defense. 191 Ga. App. at 99(5).

In support of their pre-trial motion to dismiss for selective prosecution, Agan and Sarper claimed they could not be prosecuted for paying money to county commissioners for the purpose of influencing their vote on a pending land use application because the district attorney had not prosecuted others who have made similar payments. Their offer of proof consisted of: the names of all persons who made money transfers to the two commissioners during the years 1982 through 1987; the names of all such donors who had interests in matters pending before the county commission at the times that the money transfers were made; and, derived from a comparison of those two lists, a list of money transfers that were made to the two commissioners contemporaneously with the pendency before the county commission of

applications that had been filed on behalf of such donors. The number of such transfers was 252.[5]

The Court of Appeals held, contrary to the trial court's holding,[6] that the proffer was sufficient to entitle Agan and Sarper to an evidentiary hearing.[7] We agree. We have stated the rule as to selective prosecution in the following terms:

> The party seeking to prove unconstitutionally discriminatory enforcement of the law under Yick Wo [v. Hopkins, 118 U.S. 356 (6 S.Ct. 1064, 30 LEd 220) (1886)] has the burden of presenting sufficient evidence to establish the existence of intentional or purposeful discrimination which

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[5] The indications from the proffer are that, for the years 1982, 1986, and 1987, one of the two commissioners reported 221 transfers of funds from donors having matters pending before the county commission at the times of such transfers. The total thus transferred was $164,900. The other commissioner, in 1984, received from similar donors 31 transfers that totalled $11,950.

[6] The trial court's written order recited: "Merely showing that other zoning applicants have made campaign contributions would not be sufficient in the court's opinion to sustain a claim of selective prosecution. The defendants must show that other persons are in the same or similar circumstances and have not been prosecuted. Defendants have made no showing that the state has information similar to the information on these defendants where the state failed to prosecute. For this reason, defendants' motion to dismiss for selective prosecution is denied."

This statement of legal principles is essentially correct. We disagree, however, with the trial court's assessment of the proffer.

[7] 191 Ga. App., at pp. 99-100.

> is deliberately based upon an unjustifiable standard, such as race, religion, or other arbitrary classifications.

State v. Causey, 246 Ga. 735, 737 (273 SE2d 6) (1980).[8] The proffer here included details of money transfers that were similar to those for which Agan and Sarper were prosecuted, and identified sources of reliable and available evidence, i. e., permanent public records, and names of witnesses who are disinterested in this prosecution. Because the proffer demonstrated a reasonable likelihood that Agan and Sarper might be able to prevail in their contention of selective prosecution under the rule in *Causey*, they should have been given the opportunity to submit their proofs.[9] Although this issue is now moot as to Sarper, see Division 1(b) supra, Agan is entitled to a hearing on his claim of selective prosecution.

We point out, however, that a proffer strong enough to merit an evidentiary hearing does not, of necessity, equate to proof of selective prosecution. Under the rule of *Causey*, the fact that only one person is prosecuted for doing what many others do is no warrant, in itself, for relief.[10] Agan has the burden of proving by the weight of

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[8] This standard was reiterated in *Sabel v. State*, 250 Ga. 640, 643 (300 SE2d 663) (1983) and in *Dept. of Natural Resources v. Union Timber Corp.*, 258 Ga. 873, 876 (375 SE2d 856) (1989).

[9] On their face, the allegations of Agan and Sarber appear to have more substance than those which were advanced in *Sabel*, supra, and *Causey*, supra.

[10] "Some selective enforcement is not in itself a constitutional violation." *Sabel*, supra, at p. 643. The sole fact that only one actor is prosecuted cannot be "selective prosecution," as it then would be impossible to initiate the first

the evidence that his prosecution represents an "intentional or purposeful discrimination which is deliberately based upon an unjustifiable standard, such as race, religion, or other arbitrary classification."[11] This he must establish, if he can, by proving the averments of their proffer relative to other money transfers,[12] and by showing, through the testimony of the district attorney or otherwise, the extent of any other investigations or prosecutions of donors who are situated similarly.[13] If, notwithstanding the disclosure to the district attorney of the proffer materials, it should appear that he has conducted little or no investigation into apparently similar offenses, or has initiated no prosecutions of any such offenses, only then would it be incumbent upon the district attorney to

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prosecution under a new criminal statute, or to begin a "crackdown" on unlawful behavior that had gone unchecked in the past.

[11] *Causey*, supra, at p. 737.

[12] The proffer purports to be a list of contributions made to the two commissioners involved with this prosecution. It would be relevant to the issue of "arbitrary classification" to consider a compilation of all financial transfers (within reasonable time limits) that have been made to all voting commissioners during the pendency before the county commission of matters in which the donors had financial interests.

[13] Agan and Sarper sought to cross-examine the district attorney at the hearing held on their motion. The trial court refused their request, observing: "And before I am going to require the district attorney to get on the stand and let you start cross-examining him about how he makes decisions to prosecute cases, a prima facie case and reasonable cause to believe that there is some selective prosecution [must be shown]. I don't think you have shown me enough." Our comment at note 6, above, applies as well to this ruling.

demonstrate that the prosecution of Agan is something other than selective prosecution.

Depending upon the evidence, the trial judge as trier of fact might find that similar offenses have gone uninvestigated or unprosecuted; that the district attorney knew or should have known of such offenses; and that failure to act is without a reasonable and responsible explanation.[14] Based on such a finding, the trier of fact might conclude that the circumstances support an inference of the existence of "intentional or purposeful discrimination" based upon an "unjustifiable standard" of an "arbitrary classification" – that is, an arbitrary classification whereby *only* Agan continues to be prosecuted, and all the rest go free. Such a conclusion would equate to selective prosecution.

Accordingly, and notwithstanding the reinstatement of Agan's conviction for want of reversible error during the trial, the case is remanded to the trial court with direction that an evidentiary hearing be accorded to Agan on his proffer. If he should succeed in establishing that his prosecution is "selective prosecution" under the principles we have outlined, his conviction must be vacated. Failing that, his conviction will stand.

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[14] The passage of time may be important here. Agan and Sarper were indicted and arrested in July, 1987. The motion as to selective prosecution was filed in September, 1987. Hearing was held in November, 1987, and the court denied the motion in January, 1987 [sic]. The trial took place in that same month, and a motion for new trial was denied in February, 1988. The Court of Appeals opinion was handed down in March, 1989.

5. We have reviewed the remaining contentions on appeal and find no error.

Judgment affirmed in part, reversed in part, and remanded. All the Justices concur.

APPENDIX I

380 S.E.2d 757

191 Ga.App. 92

AGAN et al.

v.

The STATE.

No. 77533.
Court of Appeals of Georgia.
March 16, 1989.
Rehearing Denied March 29, 1989.
Certiorari Granted May 11, 1989.

[191 Ga.App. 923] SOGNIER, Judge.

Ramsey Agan and Rauf Sarper appeal from their convictions of bribery of public officials in violation of OCGA § 16-10-2(a)(1).

1. We first address appellants' enumeration on the general grounds.

(a) As to appellant Agan, the evidence adduced at trial disclosed that Agan, the Honorary Turkish Consul in Atlanta, owned a five-acre parcel of land in DeKalb County on which he operated several small businesses. There was evidence that Agan wanted to construct a hotel on the property, in which he intended to provide meeting space for [191 Ga.App. 93] the local Turkish-American association of which he was an official, and that he, along with appellant Sarper, an Emory University professor, had held discussions with officials of the Emory Medical Clinic about bringing to the clinic Turkish patients who would stay at the planned hotel. After the DeKalb County Commission twice rejected his applications for a building

height variance, Agan submitted a third variance application, then contacted Commissioners Robert Lanier and John Fletcher, inquiring of each official what he (Agan) could do to obtain approval of his application. Fletcher testified that after he met with Agan in May 1987 to discuss technical aspects of the hotel project, Agan attended the Commission's June 9 meeting, and approached Fletcher in the hallway to ask for his support if the variance application came up for a vote. Fletcher testified Agan also stated he had a number of friends in the local Turkish-American association who wanted to contribute to Fletcher's campaign, but Fletcher discouraged the idea because he was not currently campaigning for reelection. This encounter with Agan left Fletcher so "very concerned" that he contacted law enforcement officials about it.

Ten days after the commission meeting, Agan and Fletcher met again, and after pressing Fletcher for his support for the variance application, Agan presented Fletcher with four checks totalling $3,700 made out to Fletcher personally and marked "for campaign contribution." The checks were drawn on the accounts of appellant Sarper and three other individuals, each of whom testified they wrote the checks, for which they were reimbursed by Agan, under the impression that Agan wanted the contributions to come from different people to give the appearance Agan enjoyed broad support in the Turkish community. Only two of the four, Sarper and one other, were aware of Agan's proposed hotel, and both testified that they knew nothing about the variance application. None of the four knew Fletcher. Fletcher testified that Agan left the four checks on the desk over Fletcher's

protests that he did not even have a campaign bank account. Thereafter, at a July 6th meeting between Agan and Fletcher during which Agan reiterated his need for the variance to ensure the economic viability of the hotel project and Fletcher indicated he remained undecided about his vote on the matter, Agan presented Fletcher with a fifth check for $800 from a third party, likewise marked as a campaign contribution. The meeting, which was videotaped by investigators from the DeKalb County District Attorney's office, showed that in response to Fletcher's inquiry as to what Agan wanted from him, Agan stated, "I need your support," but also said "I'm not asking for anything except I'll assure you, the way I feel, you will be doing service to the county because where's the tax base; and the proposed use for it will be . . . enhancing."

Also videotaped was Agan's meeting with Commissioner Robert [191 Ga.App. 94] Lanier on July 21, 1987, during which Agan discussed his need for a variance in order to attract a major hotel franchisor, his expected arrangements with Emory for patient referrals, and the objections raised by the other commissioners. Sarper attended this meeting, and as they were leaving Lanier's office Sarper handed Agan an envelope at Agan's request, and Agan and Lanier then walked back into Lanier's office where Agan presented Lanier with the envelope which contained Sarper's check to Lanier for $3,000 marked "campaign contribution." When Lanier informed Agan that he was not up for reelection for three years, Agan inquired whether Lanier "could build it up." Lanier asked Agan what he wanted for this contribution, and Agan responded, "Nothing. Not a thing. That's one

thing I want to make clear, nothing because I appreciate what you have do[n]e for me so far previously; and anything else I can do for you and I will . . . be glad to do that."

Other evidence was adduced that Agan's proposed arrangement with Emory involved Agan bringing Turkish patients to Emory with a guaranteed payment of their bills in exchange for which Emory would discount the fees charged and pay some or all of the differential to Agan.

We are convinced, after a careful review of the evidence adduced at trial, including the videotapes of the meetings with Lanier and Fletcher, that under the standard established in *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), a rational trier of fact could have found the essential elements of the crime of bribery to have been established beyond a reasonable doubt in regard to Agan. Although the evidence was in conflict, resolution thereof is for the jury. *Page v. State*, 159 Ga.App. 344, 348, 283 S.E.2d 310 (1981). Bribery is a specific intent crime, requiring proof that the defendant offered money or valuables to a government official "with the purpose [or intent] of influencing him in the performance" of an official act as an essential element of the crime. OCGA § 16-10-2(a)(1). While proof that a defendant made a campaign contribution to an elected official, even one in a position to cast a vote favorable to the defendant, is not sufficient to show a violation of OCGA § 16-10-2 because the official is "entitled" to receive such contributions, see Division 3, infra, in this case the evidence was sufficient to authorize the jury to conclude that Agan made the payments in an effort to

induce a vote in favor of his variance application. See OCGA § 16-2-6; see generally *Parham v. State*, 166 Ga.App. 855, 856(1), 305 S.E.2d 599 (1983).

The indictment charged Agan with giving payments to Lanier and Fletcher for the purpose of influencing their "vote on an application for a building height variance." Construed to uphold the verdict, the evidence disclosed that Agan considered obtaining the variance essential to his ability to achieve a sufficient return on his investment [191 Ga.App. 95] in the property, that he sought the commissioners' support specifically for that issue at the time he made the payments, and that he continued to present checks to Fletcher notwithstanding the latter's protests that he was not actively campaigning. Combined with Agan's concealment of the true source of the funds – himself – this evidence reasonably could have been considered by the jury as proof of a specific intent to bribe public officials. Further, although Agan's variance application was not on the Commission's agenda at the time he proffered the checks to Lanier and Fletcher, there was testimony that the matter could be brought up at any time either by the development board or a commissioner, and Agan told Lanier that another commissioner had agreed to place the application on the agenda once Agan had obtained enough commitments to ensure a favorable vote. Moreover, contrary to Agan's contentions in his brief, evidence of agreement by the official to whom payments are made to accept the money and act as requested is not essential to proof of intent to bribe the official. See *Page*, supra, 159 Ga.App. at 347-348, 283 S.E.2d 310. Accordingly, we find no error in the trial

court's denial of his motion for directed verdict of acquittal. See generally *Patterson v. State*, 161 Ga.App. 85, 86(4), 289 S.E.2d 270 (1982).

(b) The evidence adduced as to appellant Sarper, a professor of radiology at Emory and the VA Hospital, reveals that he participated with Agan in the proposal to bring Turkish patients to Emory, although the evidence clearly shows that Sarper was not to receive any remuneration for this plan, but instead hoped to enhance his status at Emory. While he had no financial interest in the property for which Agan was seeking the variance, there was some evidence, albeit disputed, that one of the businesses operating on the property in which Sarper owned a minority interest was to be relocated in the proposed hotel. Sarper's only direct contacts with Fletcher were two brief phone calls in which he encouraged the commissioner to support the hotel project. At the videotaped meeting between Agan and Lanier, Sarper did not join in the conversation except to state that he was present as a representative of the local Turkish-American association to indicate the Turkish community's support for Agan's project and to encourage Lanier to support it. Further, Sarper remained in the waiting area while Agan presented a check to Lanier. Sarper testified that he was unaware Agan had applied for a building height variance, that he wrote the checks to Lanier and Fletcher and obtained checks from two others at Agan's request because of Agan's desire to demonstrate his political and fund-raising clout to local politicians, and that he (Sarper) assumed the contributions were part of an effort by the national Turkish-American association to encourage lobbying at the local level.

We find the evidence insufficient to authorize a reasonable trier [191 Ga.App. 96] of fact to find the essential elements of the crime of bribery of a public official to have been established beyond a reasonable doubt as to Sarper. As discussed in section (a) of this Division, specific intent must be proved because making of a campaign contribution in an effort to influence an elected official is not sufficient proof of bribery of that official in and of itself. Sarper's presence at the meeting between Agan and Lanier was not sufficient to prove Sarper was a party to the charged bribery. *See Brown v. State,* 250 Ga. 862, 864-865(1), 302 S.E.2d 347 (1983). Since intent cannot be presumed, OCGA § 16-2-6, and the circumstantial evidence presented at trial failed to exclude every other reasonable hypothesis, OCGA § 24-4-6; see *Brown,* supra at 864-865(1), 302 S.E.2d 347, in the absence of evidence sufficient as a matter of law to establish the specific intent required by the statute and charged in the indictment, see generally *Bowman v. State,* 258 Ga. 829, 376 S.E.2d 187 (1989), the trial court erred by denying Sarper's motion for directed verdict of acquittal. See generally *Brown,* supra, 250 Ga. at 864-865(1), 302 S.E.2d 347.

2. The contention made on appeal that OCGA § 16-10-2(a) is unconstitutionally vague is meritless. *King v. State,* 246 Ga. 386, 387-388(2), 271 S.E.2d 630 (1980).

3. We find that the trial court's charge on the definition of "entitled" under OCGA § 16-10-2(a) as well as the court's failure to give either requested charges regarding the Ethics in Government Act, OCGA § 21-5-1 et seq., or an adequate substitute embodying the sole defense raised below, i.e., that the payments were campaign contributions made as part of a lobbying effort by Agan and the

local Turkish-American association rather than as bribes, constituted reversible error.

The trial court charged the jury on the definition of the offense of bribery as set forth in OCGA § 16-10-2(a)(1), which provides that "[a] person commits the offense of bribery when . . . [h]e gives or offers to give to any person acting for or on behalf of the state or any political subdivision thereof . . . any benefit, reward, or consideration to *which he is not entitled* with the purpose of influencing him in the performance of any act related to the functions of his office." (Emphasis supplied.) The trial judge then stated to the jury that "the word 'entitled' does not have any specific or extraordinary or particular legal terminology or definition. I will charge you the word 'entitled' means to give a deed or title to." With regard to the Ethics in Government Act, the court charged as follows: "A campaign contribution means a gift, an advance or deposit of money or anything of value, conveyed or transferred, for the purposes of influencing the nomination for election or election of any person for office. . . . [A] campaign contribution, as I have just defined for you, can be made directly to the candidate. . . . [U]nder Georgia Law campaign contributions [191 Ga.App. 97] can be made for use in future campaigns for elective office. . . . [I]t is not the use to which the money may be put, but it is the purpose for which the money was paid that controls."

"[I]t is an elementary rule of statutory construction that, absent clear evidence to the contrary, words should be assigned their ordinary, logical, and and common meaning. [Cits.]" *Curlee v. Mock Enterprises,* 173 Ga.App. 594, 600, 327 S.E.2d 736 (1985); see OCGA § 1-3-1(b). In

determining the ordinary signification of a word, in addition to considering dictionary or treatise definitions, courts must consider "the intention with which [the term] is used as manifested by the context and considered with reference to the subject-matter to which it relates. [Cit.]" *Thomas v. MacNeill*, 200 Ga. 418, 424, 37 S.E.2d 705 (1946).

Although we recognize that one of the definitions given to "entitle" is substantially the same as that charged by the trial court, see Black's Law Dictionary, that same source also defines "entitle" as "[t]o qualify for; to furnish with proper grounds for seeking or claiming." "Entitle" or "entitled" also has been defined as connoting "the granting of a privilege or right . . . ; to give the right to demand or receive; . . . to furnish with grounds for claiming . . . ; to furnish with grounds for seeking," 30 CJS Entitle 720-721, and as " 'qualified.' " *Davis v. City Council*, 90 Ga. 817, 820, 17 S.E. 110 (1893). We construe the clear intendment of OCGA § 16-10-2(a) as proscribing the giving or offering to a government official, with the intention of influencing the official in the performance of his duties, any benefit, reward, or consideration which he is not qualified or privileged to receive or has no grounds or right to seek, request, or receive.

Further, as OCGA § 16-10-2(a) addresses the receipt of items of value by elected officials, we agree with appellants that it should be read in conjunction with the Ethics in Government Act, which defines political contributions and sets forth the manner in which contributions may be received and reported. See generally *Thomas*, supra, 200 Ga. at 424, 37 S.E.2d 705. The Act defines campaign contributions as, inter alia, an "advance or

deposit of money or anything of value conveyed or transferred for the purpose of influencing the nomination for election or election of any person for office, . . . [and] other forms of payment made to candidates for office or who hold office when such fees and compensation made can be reasonably construed as a campaign contribution designed to encourage or influence a candidate or public officer holding elective office." OCGA § 21-5-3(6). Such contributions may be made "directly to a candidate or such candidate's campaign committee." OCGA § 21-5-30(a). Accordingly, a campaign contribution, whether made to a candidate in the heat of a campaign or to encourage or influence the official after he is elected, is something which a candidate or elected official is qualified or privileged to request [191 Ga.App. 98] or receive and thus is something to which he is "entitled" within the meaning of OCGA § 16-10-2. Consequently, we hold that the trial court's definition of "entitled," while not wholly incorrect, was incomplete and misleading in the context of this case and could have misled the jury to appellants' prejudice. See generally *New v. State*, 171 Ga.App. 392, 383(5), 319 S.E.2d 542 (1984).

Similarly, the trial court's failure to give request to charge 4, which included a portion of the definition of "contribution" found in OCGA § 21-5-3(6), as part of the charge concerning the Ethics in Government Act, or to give requests to charge 2, 3, and 8, after adjusting them to the facts of the case, was error, as those charge requests embodied appellants' sole defense. "It is the law of this state that where there is only one defense on which a party relies, failure to instruct the jury as to the evidence

supporting this defense with sufficient clarity and specificity that the jury will not only be required to pass upon it, but do so intelligently, in practicality directs a verdict against the defendant, in that the effect of the failure to charge is to withdraw and deny the defense and to that extent prejudices a defendant's right to a fair and impartial trial. [Cits.]" *Dinnan v. State,* 173 Ga.App. 191, 195, 325 S.E.2d 851 (1984). Given the evidence adduced during trial and the scope of appellants' charge requests, read as a whole the court's charge to the jury failed to inform them fully as to an essential element of the alleged crime or to explain appellants' defense and the evidence supporting it with sufficient clarity. Failure to so charge constitutes reversible error. See generally *Dinnan,* supra at 194-196(1), 325 S.E.2d 851; *New,* supra. 171 Ga.App. at 392-393(5), 319 S.E.2d 542.

4. It is also contended that the trial court erroneously permitted the admission into evidence of $7,500 in cash obtained when Lanier and Fletcher, at the direction of the district attorney, cashed the checks Agan had given them. The record reveals that as each payment to a commissioner was discussed by a witness, first the check was admitted into evidence, and then the State submitted the cash received by the witness upon cashing the check. The currency was displayed to the jury and used by the district attorney during closing argument. Although the State contends this enumeration has been waived because of the failure to interpose timely objection, we will address it because the same issue is likely to arise at retrial.

We find no merit in the State's argument that the currency was relevant to prove the commissioners had

received something of value, as "[a] check, executed and delivered, is a contract in writing by which the drawer contracts with the payee that the bank will pay to the payee therein the amount designated on presentation. [Cits.]," *Bailey v. Polote*, 152 Ga.App. 255, 256(1), 262 S.E.2d 551 (1979), and thus constitutes "consideration" within the meaning of OCGA § 16-10-2. See *Whitfield v. State*, 159 Ga.App. 398, 400(5), 283 S.E.2d 627 [191 Ga.App. 99] (1981). To the extent that there was any question as to whether the checks would be honored upon presentation, that fact could have been established either by testimony from bank officials or by testimony by Lanier and Fletcher that they were able to cash the checks. Further, we agree that admission of the currency into evidence and the manner in which it was displayed to the jury were highly prejudicial and inflammatory, and thus find its admission was error. See generally *Tuggle v. State*, 149 Ga.App. 634, 635(3), 255 S.E.2d 104 (1979).

5. The trial court ruled that appellants were not entitled to a hearing on their motion to dismiss for selective prosecution. In support of this motion, appellants presented evidence that dozens of other real estate developers had made campaign contributions to county commissioners, including Fletcher and Lanier, while zoning matters concerning the developers' properties were under consideration by the commission, and also presented affidavit testimony that the county commission chairman had used a derogatory ethnic term in referring to Agan after a debate on a variance application filed by Agan. The trial court held that appellants were not entitled to a hearing on their asserted defense of selective

prosecution because they had failed to establish a prima facie case.

"In order to prevail in a selective prosecution defense, a defendant must meet the heavy burden of (1) making a *prima facie* showing that he has been singled out for prosecution although other similarly situated persons who have committed the same acts have not been prosecuted; and (2) demonstrate that the government's selective prosecution was unconstitutional because actuated by impermissible motives such as racial or religious discrimination. [Cit.]" *United States v. Silien*, 825 F.2d 320, 322 (11th Cir. 1987); see *Sabel v. State*, 250 Ga. 640, 643(4), 300 S.E.2d 663 (1983), overruled in part on other grounds, *Massey v. Meadows*, 253 Ga. 389, 390, 321 S.E.2d 703 (1984). However, although a defendant must satisfy this two-prong test to sustain a defense of selective prosecution, to be entitled to an evidentiary hearing on a selective prosecution claim a defendant need only present evidence sufficient to establish a " 'colorable entitlement' " for the claim, or "sufficient facts 'to take the question past the frivolous state and [raise] a reasonable doubt as to the prosecutor's purpose.' [Cit.]" *United States v. Gordon*, 817 F.2d 1538, 1540(1) (11th Cir.1987).

After reviewing the record and the transcript of the pretrial hearing held in this case. We have concluded that the trial court, by ruling that appellants were not entitled to a hearing because they had not established a prima facie case, applied the wrong standard when determining whether appellants were entitled to a hearing on their selective prosecution claim. Although the issue is now moot as to [191 Ga.App. 100] Sarper, we have ruled that

Agan is entitled to a new trial on other grounds. Accordingly, if upon retrial he renews his motion to dismiss for selective prosecution, in deciding whether to grant an evidentiary hearing the trial court is to consider only whether Agan has demonstrated a "colorable entitlement" to a selective prosecution defense, not whether he has presented a prima facie case. If Agan presents evidence sufficient to raise a "reasonable doubt" as to the constitutionality of his prosecution, see *Gordon*, supra at 1540(1, 2), he will be entitled to an evidentiary hearing so that the full facts may be developed. See id.

6. Our decision in Division 1(b), supra, makes consideration of appellant Sarper's remaining enumeration unnecessary.

Judgments reversed.

CARLEY, C.J., BANKE, P.J., and BIRDSONG and BENHAM, JJ., concur.

POPE, J., concurs in Divisions 1, 2, 3, 5, and 6, and in the judgment.

DEEN and McMURRAY, P.JJ., and BEASLEY, J., dissent.

DEEN, Presiding Judge, dissenting.

I must respectfully dissent from the majority opinion, because I believe that no reversible error occurred below and that both convictions should be affirmed.

1. The majority opinion errs in concluding that the evidence was insufficient to support Sarper's conviction. Initially, I note that in his brief, Sarper's argument on this issue consists solely of his adoption of Agan's argument on the sufficiency of the evidence. As Agan's argument is

silent as to the sufficiency of the evidence to convict Sarper, pursuant to Rule 15(c) of our court, Sarper has abandoned any enumeration of error regarding this point. Nevertheless, even considering the merits of this contention, sufficient evidence authorized a rational trier of fact to find Sarper guilty beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

The majority opinion reaches the opposite conclusion seemingly by accepting Sarper's testimony at face value. However, plenty of circumstances shown during the trial provided sufficient basis for the jury to make an opposite finding as to Sarper's credibility. For example, the jury could have found patently incredible Sarper's testimony that he sat through the meeting between Agan and Lanier as they discussed the variance at length and yet had no idea what they were talking about. When asked on cross-examination about the purposes of making political contributions to the commissioners, Sarper answered, "I presume that when you make political contributions to politicians, they do something to expedite the process. Everybody knows that." Sarper further replied, when asked if he knew that a politician will help you if you contribute to his campaign, "I have previously experienced it . . . " From these statements and circumstances, the [191 Ga.App. 101] jury could have rejected Sarper's claim of innocence and found instead a corrupt intent. "If something looks like [a bribe], sounds like [a bribe], and acts like [a bribe], it probably is [a bribe], regardless of whether or not one uses the magic word itself." *State v. Hughes*, 189 Ga.App. 671, 676, 377 S.E.2d 192 (1988). (Deen, P.J., dissenting).

"Left to exercise their common-sense in their own way, the jury will generally determine correctly what is well proved and what lacks further support . . . What shall come to the jury as evidence, is for the court. What it is worth when it arrives, is for the jury . . . The judge may well assume that they have a fair aptitude for their share of the common business." *Moughon v. State*, 57 Ga. 102, 106-107 (1876).

2. The trial court's jury charge on the definition of "entitled" under OCGA § 16-10-2(a) was incomplete and somewhat confusing. Even the State concedes that. However, I cannot agree with the majority opinion that this minor confusion misled the jury. The jury charge informed the jury of the essential elements of the offense of bribery, and the evidence certainly proved those elements. Under these circumstances, the incomplete definition of "entitled" was inconsequential and harmless error.

I also cannot agree with the majority opinion's conclusion that the trial court erred in refusing to give the appellants' requested jury charges on law and definition of campaign contributions. Comparison of the requested jury charges to the jury charge given by the trial court shows that the trial court did adequately inform the jury on that subject matter. Failure to give requested charges in the exact language requested where the charge given substantially covers the same principles, is not grounds for reversal. *Woods v. State*, 187 Ga.App. 105, 369 S.E.2d 353 (1988).

3. The majority opinion is in error in concluding that the admission of cash, obtained when the commissioners presented the checks given to them by the appellants, was highly prejudicial and inflammatory and reversible error. The proper resolution of this enumeration of error simply is that the appellants waived any objection at trial. The cash from the $3,000 check was specifically admitted without objection by counsel for both Agan and Sarper. When the cash from the $3,370 worth of checks was tendered, Sarper's attorney stated that he had no objection, and counsel for Agan stated that he had his objection on the record, when there was, in fact, no objection on record. Only when the $800 cash from the check written by Mohammad Hassan to one of the commissioners was tendered, was there an objection. Counsel for Agan stated that he had the same objection, and counsel for Sarper merely objected on the grounds of relevance. Noting that there had been on objections before, the trial court admitted the cash into evidence. Under these circumstances, the appellants' [191 Ga.App. 102] waiver of any objection is clear. Even if the only objection to this evidence were considered, the district attorney's explanation that the cash was offered to show that the checks were good, was a sufficient showing of relevance.

4. Assuming, arguendo, that, as advised by the majority opinion, the appellants would be entitled to an evidentiary hearing on their selective prosecution defense upon their showing a "colorable entitlement" to that defense, it is clear that the appellants failed in this regard. In support of their motion to dismiss for selective prosecution, the appellants submitted some evidence that

other real estate developers had made some campaign contributions to county commissioners while zoning matters concerning the developers' properties were under consideration by the commission, and an affidavit in which a person recalled the county's chief executive officer's reference to Agan as a "g . . . d . . . sand nigger."

As noted by the majority opinion, "[i]n order to prevail in a selective prosecution defense, a defendant must meet the heavy burden of (1) making a *prima facie* showing that he has been singled out for prosecution although other similarly situated persons who have committed the same acts have not been prosecuted; and (2) demonstrate that the government's selective prosecution was unconstitutional because actuated by impermissible motives such as racial or religious discrimination. [Cit.]" *United States v. Silien*, 825 F.2d 320, 322 (11th Cir.1987). In the instant case, the appellants made no showing whatever of similarity between the other developers and themselves. Considering the fact that the county's chief executive officer does not vote on zoning matters and does not even attend zoning meetings, and that it was the district attorney, and not the chief executive officer, who decided to prosecute the appellants for bribery, any derogatory ethnic remark attributable to the chief executive officer is irrelevant. The appellants thus made no showing of "colorable entitlement" to the defense, and the trial court properly denied both the request for an evidentiary hearing and the motion to dismiss.

5. Although the majority opinion does not address the issue because of its conclusion that the evidence did not support Sarper's conviction, I note also that the trial court did not abuse its discretion in denying Sarper's

motion to sever. *Rivers v. State,* 178 Ga.App. 310, 342 S.E.2d 781 (1986).

I am authorized to state that Judge BEASLEY joins in this dissent.

APPENDIX J

IN THE SUPERIOR COURT FOR THE COUNTY
OF DEKALB, STATE OF GEORGIA
JANUARY TERM, 1988

STATE OF GEORGIA	)	INDICTMENT NO
	)	87-CR-3093
vs.	)	
	)	VOLUME IV
RAMSEY AGAN and	)	
RAUF SARPER	)	

TRANSCRIPT OF EVIDENCE

* * *

Excerpts from Charge to the Jury, including entire charge on substantive elements of crime of bribery:

. . .

(Page 809 [1.7] through page 811 [1.9].)

As you know the defendants in this case are charged with the offense of bribery. Let me go over with you the Georgia Law, the definition which will contain the elements that must be proven by the State beyond a reasonable doubt for a conviction as to the kind of bribery. Under Georgia Law a person commits bribery when he gives or offers to give to any person acting for or on behalf of the State or any political subdivision thereof, any benefit, reward or consideration to which he is not entitled, with the purpose of influencing him in the performance of any act related to the function of his office or employment.

Now, the word "entitled" does not have any specific or extraordinary or particular legal terminology or definition. I will charge you the word "entitled" means to have a deed or title to.

I will further charge you that the DeKalb County Board of Commissioners serve DeKalb County and DeKalb County is a political subdivision of the State of Georgia.

Now, there is in Georgia Law an Act which is known as the Ethics in Government Act. This Act, among other things, discuss campaign contributions. Let me define for you, under the Ethics in Government Act, the definition of a campaign contribution. Now, for the purpose of this case, there are certain other elements of the definition which are not material. It is a rather long definition and it will be very confusing. What I have done is taken the relevant sections, the sections that I think are necessary for you to understand in your consideration of this case: A campaign contribution means a gift, an advance or deposit of money or anything of value, conveyed or transferred, for the purposes of influencing the nomination for election or election of any person for office.

I will further charge you that a campaign contribution, as I have just defined for you, can be made directly to the candidate.

Now, I will further charge you that under Georgia Law campaign contributions can be made for use in future campaigns for elective office.

In this regard, and in light of the instructions I have given you earlier, I will tell you that *it is not the use to which the money may be put, but it is the purpose for which the money was paid that controls.*

. . .

(Page 810 [1.5] through page 810 [1.22].)

Now, there is in Georgia Law an Act which is known as the Ethics in Government Act. This Act, among other things, discusses campaign contributions. Let me define for you, under the Ethics in Government Act, the definition of a campaign contribution. Now, for the purpose of this case, there are certain other elements of the definition which are not material. It is a rather long definition and it will be very confusing. What I have done is taken the relevant sections, the sections that I think are necessary for you to understand in your consideration of this case: A campaign contribution means a gift, an advance or deposit of money or anything of value, conveyed or transferred, for the purposes of influencing the nomination for election or election of any person for office.

. . .

(Page 826 [1.4] through page 826 [1.20].)

Well, let me recharge you generally on what the law is as to intent. You recall when I charged you on intent I said intent is an essential element of any crime. Intent must be proved by the State beyond a reasonable doubt. Now, intent can be shown in many ways, provided you, the jury, believe that it existed from the proven facts before you and can be inferred from proven circumstances or by acts and conduct or it may be, in your discretion, inferred when it is the natural and necessary consequence of the act.

Now, criminal intent does not mean the intent to violate the law or to violate any particular criminal statute. Criminal intent means simply to intend to commit the act which is prohibited by a statute.

. . .

(Page 828 [1.24] through page 829 [1.8].)

This is, again, an inference which the jury can make. The jury can infer in this case, if you wish to do so, that the acts of a person of sound mind and discretion are the products of his will. And you can also infer, if you wish to do so, that a person of sound mind and discretion intends the natural and probable consequences of his acts. Whether you make any inferences in this case is a matter solely within the discretion of the jury.

(For original charge on issue of intent, *see* App. 17-19, *supra*.)

APPENDIX K

IN THE SUPERIOR COURT OF DEKALB COUNTY

STATE OF GEORGIA

STATE OF GEORGIA,	)	
	)	CRIMINAL CASE NO.
vs.	)	87-CR 3093
RAMSEY AGAN,	)	
MUSTAFA RAUF SARPER,	)	
DEFENDANTS.	)	

DEFENDANT'S REQUESTS TO CHARGE THE JURY

* * *

REQUEST NO. 2

It is not illegal or improper to make a contribution to the election or reelection campaign of an incumbent office holder.

1975 Op. Attorney General

No. 75-143

REQUEST NO. 3

There is nothing improper or illegal about contributing directly to a candidate or public official. A citizen is entitled to present his contribution directly to the candidate or public official in person.

It is not illegal or improper to make a check out directly to the candidate or public official. The fact that the checks in evidence before you are made out to Mr. Fletcher and Mr. Lanier does not make them illegal.

O. C. G. A. 21-5-33.

REQUEST NO. 4

A campaign contribution is a payment which can reasonably be construed to encourage or influence a public officer holding elected office.

O.C.G.A. 21-5-3(6)

* * *

REQUEST TO CHARGE NO. 8

If you find that the checks given by the defendants to the elected officials are campaign contributions then you must acquit the defendants.

I further charge you that if the State has no direct evidence that the checks are not campaign contributions then the circumstantial evidence must convince you beyond a reasonable doubt that they are not campaign contributions.

REQUEST TO CHARGE NO. 9

It is not illegal to make a campaign contribution to a public official for the purpose of influencing his decision on a matter pending before, or which in the future may be considered by, the public official, if it is not conditional.

APPENDIX L

426 S.E.2d 552

262 Ga. 783

AGAN et al.

v.

The STATE

No. S93G0833
Supreme Court of Georgia
February 25, 1993

FLETCHER, Justice.

We granted the writ of certiorari to consider whether the trial court erred in excluding post-indictment evidence related to Ramsey Agan's claim that the district attorney failed to investigate corrupt campaign practices. See *Agan v. State*, 203 Ga. App. 363, 366 (417 SE2d 156) (1992). Although Agan contends that the trial court consistently denied his attempts to introduce post-indictment evidence at the hearing on his claim of selective prosecution, the record shows that no limitation was placed on the time or subject of the district attorney's testimony. In addition, the trial court permitted Agan to introduce evidence of post-indictment campaign contributions made to commissioners by other developers while their zoning applications were pending.

A trial court's rulings on the relevancy of evidence will not be disturbed unless there is an abuse of discretion. *Anderson v. State*, 258 Ga. 278, 279 (368 SE2d 508) (1988). Given the district attorney's testimony and the

admission of other post-indictment evidence, we conclude the trial court did not abuse its discretion in ruling on the admissibility of evidence.

Judgment affirmed. Clarke, C.J., Hunt, P.J., Benham, Sears-Collins and Hunstein, JJ., concur.

APPENDIX M

417 S.E.2d 156

203 Ga. App. 363

AGAN et al.

v.

The STATE

No. A91A1597
Court of Appeals of Georgia
January 22, 1992

COOPER, Judge.

This is the second appearance of this case in this court. Ramsey Agan, the Honorary Turkish Consul in Atlanta, and a codefendant, Dr. Rauf Sarper, were indicted for bribery in 1987 and in 1988, after a trial by jury, were convicted. Our first opinion, *Agan v. State*, 191 Ga. App. 92 (380 SE2d 757) (1989), contains a complete discussion of the facts leading to the indictments. Agan and Sarper transferred in excess of $7000 denominated as campaign contributions to two Dekalb county [sic] commissioners, in an attempt to gain their favorable votes on a zoning variance for property owned by Agan. Prior to trial, Agan and Sarper filed a joint motion to dismiss for selective prosecution and requested a full evidentiary hearing on that issue. The trial court held a pre-trial hearing on the motion at which a proffer of evidence was made by the defendants, yet the trial court concluded that the proffer was not sufficient to warrant an evidentiary hearing and denied the motion to dismiss. Defendants appealed their convictions, and this court reversed both convictions in *Agan*, supra. Sarper's conviction was

reversed on the general grounds, and Agan's conviction was reversed on the jury charge and certain evidentiary issues. This court also determined that, based on the proffer of evidence by the defendants, the trial court erred in denying an evidentiary hearing on the issue of selective prosecution. The Georgia Supreme Court, in *State v. Agan*, 259 Ga. 541 (384 SE2d 863) (1989), declined to review the decision reversing Sarper's conviction, yet reversed this court with respect to Agan on the jury charge and rejected certain constitutional arguments raised by Agan. Nevertheless, the Supreme Court affirmed this court's decision on the issue of selective prosecution and remanded the case to the trial court with direction that an evidentiary hearing be accorded to Agan on his proffer. Pursuant to that direction, the trial court held a full evidentiary hearing on Agan's claim of selective prosecution and after hearing the evidence, issued an order in which Agan's motion to dismiss was denied because the court determined that Agan had not carried his burden to prove selective prosecution. It is from this order that Agan now appeals, raising six enumerations of error.

1. Appellant first enumerates that the trial court erred in ruling that he failed to prove the existence of selective prosecution in his case. " 'Some selective enforcement is not in itself a constitutional violation. [Cit.] To be a constitutional violation, the selective enforcement must represent an intentional and purposeful discrimination based upon some unjustifiable standard such as race, religion, or other arbitrary classification. [Cits.]' [Cits.] 'The burden is on the defendant to prove a selective prosecution by showing (1) that

others *generally* are not prosecuted for the same misconduct, and (2) the decision to prosecute him was based upon impermissible grounds such as race, religion or exercise of constitutional rights.' [Cits.]" *State v. Jackson,* 188 Ga. App. 259 (2) (372 SE2d 823) (1988). See *Sabel v. State,* 250 Ga. App. 640 (4) (300 SE2d 663) (1983); *State v. Causey,* 246 Ga. 735 (2) (273 SE2d 6) (1980). As stated in *Georgia Dept. of Natural Resources v. Timber Corp.,* 258 Ga. 873 (3) (375 SE2d 856) (1989), "[appellant] had the burden of presenting sufficient evidence of intentional or purposeful discrimination, . . . [Cit.], which burden would not have been carried even if it had been shown that other persons or classes of persons may have violated the law without being prosecuted therefor. [Cit.]" In the instant case, the Georgia Supreme Court specified the evidence necessary for appellant to carry his burden, the response required of the State to counter appellant's proof, and the proof that would be sufficient to support an inference of the existence of discrimination by the trier of fact. The Supreme Court stated:

> "[T]he fact that only one person is prosecuted for doing what many others do is no warrant, in itself, for relief. Agan has the burden of proving by the weight of the evidence that his prosecution represents an an [sic] 'intentional or purposeful discrimination which is deliberately based upon an unjustifiable standard, such as race, religion, or other arbitrary classification.' This he must establish, if he can, by proving the averments of the proffer relative to other money transfers, and by showing, through the testimony of the district attorney or otherwise, the

extent of any other investigations or prosecutions of donors *who are situated similarly.* If, notwithstanding the disclosure to the district attorney of the proffer materials, it should appear that he has conducted little or no investigation into *apparently similar offenses,* or has initiated no prosecutions of any such offenses, only then would it be incumbent upon the district attorney to demonstrate that the prosecution of Agan is something other than selective prosecution.

Depending upon the evidence, the trial judge as trier of fact might find that similar offenses have gone uninvestigated or unprosecuted; that the district attorney knew or should have known of such offenses; and that failure to act is without a reasonable and responsible explanation. Based on such a finding, the trier of fact might conclude that the circumstances support an inference of the existence of 'intentional or purposeful discrimination' based upon an 'unjustifiable standard' of an 'arbitrary classification' – that is, an arbitrary classification whereby *only* Agan continues to be prosecuted, and all the rest go free. Such a conclusion would equate to selective prosecution." *State v. Agan,* supra at 548-549. (Footnotes ommitted [sic].) (Emphasis added.)

At the evidentiary hearing before the trial court, appellant extensively examined four public officials, seven major real estate developers in the Atlanta area, a lawyer who represents many major developers in zoning matters, the two commissioners contacted by appellant and the district attorney, in an attempt to meet his burden of proof. Appellant subpoenaed public and personal

records from the witnesses, and he presented evidence gleaned from the records produced. Appellant's proof at the hearing centered primarily on his theory of "chronological coincidence." Appellant contended that the first part of his burden was met by his proof that several other developers who were not prosecuted or even investigated had made campaign contributions to Dekalb [sic] County Commissioners at the time they had zoning matters pending before the commission. Appellant further argued and attempted to show that the two commissioners involved in this case were accepting money from these other developers for their favorable zoning votes and, in an attempt to deflect scrutiny from themselves, they reported Agan to focus attention upon him and to satisfy the public desire for investigation into these practices. Appellant completed his theory by attempting to prove that there was a "good old boy" conspiratorial network in Dekalb [sic] County consisting of the major real estate developers, attorney Douglas Dillard, a prominent zoning attorney, Manuel Maloof, the chief executive officer of Dekalb [sic] County, and Robert Wilson ("Wilson"), the Dekalb [sic] County District Attorney. Appellant contended, and endeavored to prove, that this "network" sustained and protected the practice of contributing to commissioners' campaigns to gain favorable zoning votes in return. Appellant alleged that this network, especially Manuel Maloof, was prejudiced against Turkish nationals and that all the discriminatory, prejudicial and conspiratorial motives of the "network" are imputed to the district attorney, thereby resulting in a prosecution selectively and discriminatorially [sic] focused on Turkish foreigners who were outside the system. The trial court,

while acknowledging that appellant did in fact prove that other developers had made campaign contributions while they had zoning matters pending before the county commission, failed to find any evidence of intentional or purposeful discrimination that generated the prosecution of appellant. Based on the evidence received at the hearing, the trial court concluded that the district attorney responded only to the evidence he had in appellant's case and that he had not failed to prosecute any other case with similar information. The trial court, citing the existing case law on selective prosecution, determined that proof of other campaign contributions alone, without proof of intentional discrimination by the district attorney, was not sufficient to void appellant's conviction on the grounds of selective prosecution.

We agree with the trial court. We have read and reviewed the entire transcript before us, including all the testimony and the documents produced. Appellant has not met the burden of proof set forth in *Jackson*, supra, and the other cases cited herein, nor has he presented the proof required to support an inference of discrimination per the Supreme Court's statement in *State v. Agan*, supra. First, appellant has not shown that others in a similar situation were not prosecuted. While appellant did show that other developers made contributions while they had zoning matters pending, he failed to show that the contributions of those developers were accompanied by the following factors attendant to the contributions made by appellant: the contributions were made at a time when the commissioners did not have an active campaign structure; appellant propounded his zoning request at the

same meeting that he gave the contributions, in envelopes, directly to the commissioners; at the same meetings, appellant promised future contributions; the checks were make out to the commissioners personally rather than to their campaigns; appellant was very persistent in talking to the commissioners and giving them contributions; a videotape of the contact with the commissioners was made and was available as evidence; the votes of either of the two commissioners involved was necessary for appellant's zoning to be passed; and the two commissioners approached the district attorney with the evidence of the bribe. When all these factors coalesce, appellant's situatior [sic] becomes of a different category than the situations attempted to be shown at the hearing. We find no evidence that anyone else crossed the line of illegality as did appellant. While the district attorney indicated that other situations may appear improper, appellant failed to show that the district attorney knew or should have known of other situations in which the line of illegality was crossed. Despite appellant's failure to prove similarly situated persons, appellant likewise failed to prove any intentional discriminatory motive of Wilson and the district attorney's office. As the trial court reiterated, the motives of the commissioners or Manuel Maloof, whatever they may be, are irrelevant unless shared by Wilson, thereby affecting his decision to prosecute. The federal cases cited by appellant in an attempt to impute the supposed motives of others to Wilson are inapposite and we find appellant's theory disingenuous. Considering Wilson's testimony and the other testimony presented in detail, there is no proof that Wilson prosecuted appellant for any reason other than good faith law

enforcement. Moreover, there is no evidence to support the inference of discrimination as set forth in *State v. Agan*, supra. As just stated, appellant did not present similar situations that went uninvestigated, nor did appellant show that Wilson had access to information such that he knew or should have known of any similar situation. Wilson testified that he was only aware of a public perception that developers make large contributions to commissioners in an attempt to get their zoning requests passed; however he stated that he cannot convene grand juries or prosecute based upon what he reads in the newspaper. The testimony showed that Wilson was not aware of any specific case, nor did he ignore any information that was brought to his attention. In the wake of appellant's case, Wilson investigated and questioned each commissioner about their campaign contributions and discovered no other situations with the factors that coalesced in appellant's case. Wilson stated that he could not prosecute without evidence and with no basis to believe that bribery had occurred. Wilson's testimony establishes a reasonable explanation for his prosecutorial decisions and supports the conclusion of a good faith prosecution of appellant. Appellant's first enumeration has no merit.

2. Appellant next contends that the trial court erred in referring to the reversal of Sarper's conviction as an indication of the amount of proof necessary for the district attorney to proceed with a bribery case. In its order, the trial court commented on the reversal of Sarper's conviction, stating that "[i]t is most anomalous to now believe the district attorney should proceed against other developers when the appellant [sic] courts would not

even sustain Sarper's conviction. If anything, the reversal of Sarper's conviction suggests even more evidence is necessary before a district attorney can present an indictment in this type of case." While we do not feel that these comments regarding Sarper's conviction were necessarily correct or necessarily relevant to the issue before the trial court, the remainder of the trial court order and the decision reached by the court is otherwise correct, as we held in Division 1. Therefore, these comments do not constitute reversible error since " 'we have consistently held that a correct decision of a trial court will not be reversed, regardless of the reasons given therefor.' [Cit.]" *Colquitt v. State,* 196 Ga. App. 817 (1) (397 SE2d 164) (1990).

3. In his remaining enumerations, appellant asserts that the trial court erred in placing time limitations on the subpoenas issued to the witnesses and in excluding evidence that related to certain time periods as irrelevant. The trial court limited the subpoenas issued to the developer witnesses and required them to produce personal documents relating only to the two years prior to appellant's indictment in 1987. Appellant's original subpoenas requested the developers' and the commissioners' personal documents from 1983 to the time of the hearing in 1990. The trial court, although first limiting the commissioners' subpoenas to the two years prior to the indictment, later allowed appellant to request all personal documents of the commissioners from 1982 to the time of the indictment. The public records subpoenaed by appellant were not limited by the trial court. The transcript reveals that the testimony of the developers and the commissioners was not strictly limited with respect to

time, so that many questions relating to events after the indictment and prior to 1985 were allowed. The trial court held the view that since any alleged selective prosecution occurred at the time of the indictment, post indictment documentary evidence was irrelevant. However, the testimony of the district attorney was not limited accordingly, and appellant was able to question Wilson on matters relating to any time period. Further, the trial court reiterated during the hearing that he would keep an open mind, and if the relevance of any evidence were shown, he would expand his ruling. The specific evidentiary rulings cited by appellant were based upon the trial court's conclusion that the evidence was not relevant to the specific issue at hand – selective prosecution. " 'Even though our rule favors the admission of relevant evidence, the admission or exclusion of evidence which is objected to on the ground of relevancy lies within the sound discretion of the trial court, whose decision will not be disturbed on appeal absent a clear abuse of discretion.' [Cit.]" *Barnwell v. State*, 197 Ga. App. 116 (5) (397 SE2d 717) (1990). The Georgia Supreme Court recognized the necessity of "reasonable time limits" on the documentary evidence produced, see *State v. Agan*, supra at 548 n. 12, and our review of the record reveals no abuse of the trial court's discretion, no error in his rulings and no barriers to the full presentation of appellant's case. These enumerations are, likewise, without merit.

Judgment affirmed. Birdsong, P. J., and Pope, J., concur.

APPENDIX N

IN THE SUPERIOR COURT OF DEKALB COUNTY
STATE OF GEORGIA

STATE OF GEORGIA,	*	CRIMINAL NO. 87CR3893
v.	*	ORDER ON MOTION TO DISMISS FOR SELECTIVE PROSECUTION (Filed Jan. 7, 1991)
RAMSEY AGAN,	*	
Defendant.	*	

This case is before the court to decide defendant Ramsey Agan's motion to dismiss for selective prosecution. Agan was tried and convicted of bribing two county commissioners. On appeal, the Supreme Court of Georgia affirmed the jury verdict, but directed the trial court to conduct an evidentiary hearing on the question of selective prosecution. *State v. Agan*, 259 Ga. 541, 546, 384 SE2d 863 (1989), *cert. denied*, 110 S.Ct. 1526. After considering the evidence presented at the hearing and the law, the court denies the motion.

The defendant contends he should not be prosecuted because others in similar circumstances have not been prosecuted by the district attorney. He argues he was singled out for prosecution because of his Turkish origin.

The court finds no evidence of intentional or purposeful discrimination in this case. While the defendant has shown that other developers have made campaign contributions while they had matters pending before the county commission, the court does not believe this evidence is sufficient to void Agan's conviction. The appropriate focus in a motion for selective prosecution is

whether the district attorney deliberately discriminated against the defendant based on an unjustifiable standard, such as race, religion or some other arbitrary classification. *State v. Causey*, 246 Ga. 735, 737, 273 SE2d 6 (1980), quoting *Yick Wo v. Hopkins*, 118 U.S. 356 (1885).

The evidence establishes the district attorney decided to investigate when the county commissioners in question reported to the police they believed they were being offered a bribe. Except for one instance considerably earlier involving another district attorney, no one has suggested this district attorney has failed to prosecute or present to the grand jury any case with similar information. With the evidence presented to him, the district attorney then decided to videotape the meetings with the defendant to see if the defendant's conduct would satisfy the very specific intent requirement of the state bribery law, O.C.G.A. 16-10-2. After reviewing these videotapes, the district attorney presented the case to a grand jury.

The state argues bribery is quite difficult to prove. More evidence is required than the mere fact of campaign contributions while zoning matters are pending. Indeed, although a jury unanimously found co-defendant Sarper guilty of bribery, both appellate courts of this state overturned his conviction because of insufficient evidence. It is most anomalous to now believe the district attorney should proceed against other developers when the appellate courts would not even sustain Sarper's conviction. If anything, the reversal of Sarper's conviction suggests even more evidence is necessary before a district attorney can present an indictment in this type of case.

Defendant spends much time and effort rearguing why he never should have been convicted by the jury. His recitation of facts tries to show he did nothing more than others have done. The jury in this case heard his explanation and also watched the videotapes in question. They then decided to covict [sic] him of bribery. Defendant's guilt or innocence is no longer an issue.

Because defendant Agan has not carried his burden of proving selective prosecution, his motion to dismiss is hereby DENIED.

So ORDERED this 7th day of January, 1991.

/s/ Robert J. Castellani
ROBERT J. CASTELLANI,
JUDGE
STONE MOUNTAIN
JUDICIAL CIRCUIT

Copies to: Jake Arbes
Tom Clegg
Barbara Conroy
Bobby Lee Cook

APPENDIX O

IN THE SUPERIOR COURT OF DEKALB COUNTY

STATE OF GEORGIA

STATE OF GEORGIA,	)	
	)	
vs.	)	CASE NO. 87CR-3093
RAMSEY AGAN and	)	
MUSTAFA	)	
RAUF SARPER,	)	
DEFENDANTS	)	

MOTION TO DISMISS FOR SELECTIVE PROSECUTION AND MOTION FOR EVIDENTIARY HEARING

(Filed Sept. 17, 1987)

Come now the Defendants Ramsey Agan and Mustafa Rauf Sarper, and request that this Court enter an order dismissing the above-referenced indictments in all counts on the basis that they are being selectively prosecuted because of their national origin. This selective prosecution violates the 14th Amendment to the United States Constitution and the Constitution of the State of Georgia.

Because of the great volume of documentary and testimentary evidence which must be presented to support defendants position on this motion defendants respectfully request that this Court grant an evidentiary hearing no sooner than 90 days from today's date so that their attorneys may complete their investigation and interviews of potential witnesses so as to provide an adequate and effective defense for the defendants.

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P. Bruce Kirwin
Attorney for Defendant
Mustafa Rauf Sarper

IN THE SUPERIOR COURT OF DEKALB COUNTY
STATE OF GEORGIA

STATE OF GEORGIA,	)	
	)	
vs.	)	CASE NO. 87CR-3093
RAMSEY AGAN and	)	
MUSTAFA	)	
RAUF SARPER,	)	
DEFENDANTS	)	

BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS FOR SELECTIVE PROSECUTION

Come now Ramsey Agan and Mustafa Rauf Sarper defendants in the above-styled action and files [sic] this their Brief in Support of Motion to Dismiss for Selective Prosecution.

STATEMENT OF FACTS

Ramsey Agan and Mustafa Rauf Sarper have been accused in an indictment of four counts of bribery; violation of O.C.G.A. § 16-10-2. The factual basis of the indictment is a series of checks which were delivered by Agan

and Sarper to two DeKalb County Commissioners-Fletcher and Lanier. All these checks were clearly marked denominating that they were to be campaign contributions and were to be delivered to said commissioners as campaign contributions.

Agan specifically stated to both commissioners that these were contributions and were not contingent upon any specific action by the commissioners. (Affidavit of Agan).

The Campaign Financing Disclosure Reports [which are filed with the Probate Court of DeKalb County] indicate that there are other individuals who have made political contributions to these two commissioners while zoning petitions affecting their interests were pending before the DeKalb County Commission.

None of the other individuals have been indicted.

ARGUMENT AND CITATION OF AUTHORITY

DEFENDANTS INDICTMENT IS INVALID FOR THE REASON THAT IT IS A DISCRIMINATORY PROSECUTION AND VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Discriminatory prosecution or enforcement of a criminal statute has been recognized as a valid defense to a criminal charge. The Supreme Court of the United States recognizes this defense in the landmark case of *Yick Wo v. Hopkins* (1886) 18 U.S. 356. The Court stated . . .

"Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered

by public authority with an evil eye and unequal hand, so as practically to make unjust and illegal discrimination between persons in similar circumstance, material to their rights, the denial of due process is still within the prohibition of the Constitution".

As recently as 1962 in the case of *Oyler v. Boles,* 368 U.S. 448, the Court stated . . .

"The equal protection clause is violated if a criminal prosecution was deliberately based upon an unjustifiable standard such as race, religion or other arbitrary classification".

The Supreme Court is simply setting forth a statement that a law can be fair on its face but unfair in its application.

There is nothing unfair about O.C.G.A. § 16-10-2 if it is applied equally to all people similarly situated.

The Supreme Court of Georgia has recognized the defense of selective prosecution in the case of *Sabel v. State,* 250 Ga. 640 (1983), p. 643. The Court cites *Oyler v. Boles* (supra). The Georgia Supreme Court addresses the issue squarely by stating selective enforcement is not a constitutional violation, but it is a constitutional violation if the selective enforcement must represent an intentional and purposeful discrimination based upon some unjustifiable standard such as race, religion or other arbitrary classification.

The facts before this court go even further in that there is an affidavit from a former county commissioner

which shows that there is strong evidence that the Chairman of the DeKalb County Commissioner, Manual Maloof, has indicated a strong prejudice against defendant Agan because of his national origin which would be evidence of purposeful and arbitrary discrimination.

Once the defendant presents evidence of intentional and arbitrary discrimination defendants had carried the threshold issue and the State should be required to show that the selection process actually rested on some valid ground.

It is clear from even the preliminary evidence before this Court that there are a number of other people similarly situated as to the defendants who have not been prosecuted are generally never prosecuted. The statements of the present DeKalb County Commissioner Chairman indicates a strong prejudice which could evidence itself in purposeful discrimination against these Defendants.

Defendants have presented evidence which creates a strong inference of discriminatory prosecution. It is now the State's obligation to show that this prosecution rests on some valid ground if possible. See *Associated Industries of Alabama v. State,* 314 Sou. 2d 879, 55 Alabama App. 377.

CONCLUSION

The Court should dismiss the indictment against Defendants on the basis that their prosecution was based on arbitrary classification.

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Mustafa Rauf Sarper

APPENDIX P
GEORGIA BRIBERY STATUTE
O.C.G.A. § 16-10-2

(a) A person commits the offense of bribery when:

(1) He or she gives or offers to give to any person acting for or on behalf of the state or any political subdivision thereof, or of any agency of either, any benefit, reward, or consideration to which he or she is not entitled with the purpose of influencing him or her in the performance of any act related to the functions of his or her office or employment; or

(2) A public official, elected or appointed, or an employee of this state or any agency, authority, or entity of the state, or any county or municipality or any agency, authority, or entity thereof, directly or indirectly solicits, receives, accepts, or agrees to receive a thing of value by inducing the reasonable belief that the giving of the thing will influence his or her performance or failure to perform any official action. A thing of value shall not include:

(A) Food or beverage consumed at a single meal or event;

(B) Legitimate salary, benefits, fees, commissions, or expenses associated with a recipient's nonpublic business, employment, trade, or profession;

(C) An award, plaque, certificate, memento, or similar item given in recognition of the recipient's civic, charitable, political, professional, or public service;

(D) Food, beverages, and registration at group events to which all members of an agency, as defined in paragraph (1) of subsection (a) of a Code Section 21-5-30.2, are invited. An agency shall include the Georgia House of Representatives, the Georgia Senate, committees and subcommittees of such bodies, and the governing body of each political subdivision of this state.

(E) Actual and reasonable expenses for food, beverages, travel, lodging, and registration for a meeting which are provided to permit participation or speaking at the meeting;

(F) A commercially reasonable loan made in the ordinary course of business;

(G) Any gift with a value less than $100.00;

(H) Promotional items generally distributed to the general public or to public officers;

(I) A gift from a member of the public officer's immediate family; or

(J) Food, beverage, or expenses afforded public officers, members of their immediate families, or others that are associated with normal and customary business or social functions or activities; provided, however, that receiving, accepting, or agreeing to receive anything not enumerated in subparagraphs (A) through (J) of this paragraph shall not create the presumption that the offense of bribery has been committed.

(b) A person convicted of the offense of bribery shall be punished by a fine of not more than $5,000.00 or by imprisonment for not less than one nor more than 20 years, or both.

APPENDIX Q

GEORGIA ETHICS IN GOVERNMENT ACT: CONTRIBUTIONS TO CANDIDATES FOR PUBLIC OFFICE, FIRST ENACTED BY GA.L. 1990, P. 922, § 6:

O.C.G.A. § 21-5-41

* * *

(a.1) No person shall during the course of any non-election year make contributions to any candidate for the General Assembly or public office other than state-wide elected office which in the aggregate for that year exceed $1,000.00. No person shall during the course of any election year make contributions to any candidate for the General Assembly or public office other than state-wide elected office which in the aggregate for that year exceed $2,000.00.

APPENDIX R

FORMER GEORGIA LOBBYING STATUTE, REPEALED BY GA.L. 1992, P. 1075, § 18, EFFECTIVE APRIL 6, 1992

O.C.G.A. § 28-7-1

(a) Lobbying is any personal solicitation of a member of the General Assembly, during a session thereof, by private interview, or letter, or message, or other means, not addressed solely to the judgment, to favor or oppose, or to vote for or against any bill, resolution, report, or claim, pending or to be introduced in either branch thereof, by any person who misrepresents the nature of his interest in the matter to such member or who is employed for a consideration by a person or corporation interested in the passage or defeat of such bill, resolution, report, or claim for the purpose of procuring the passage or defeat thereof. Lobbying shall not include such service as drafting petitions, bills, or resolutions; attending to the taking of testimony; collating facts; preparing arguments and memorials and submitting them orally or in writing to a committee or member of the General Assembly; and other services of like character intended to reach the reason of the legislators.

(b) Lobbying shall be punished by confinement in the penitentiary for not less than one year nor more than five years. (Ga. L. 1878-79, p. 29, §§ 1, 2; Code 1882, §§ 4486a, 4486b; Penal Code 1895, §§ 319, 320; Penal Code 1910, §§ 324, 325; Code 1933, § 47-1001.)

APPENDIX S

GEORGIA ETHICS IN GOVERNMENT ACT: PUBLIC OFFICIALS' CONDUCT & LOBBYIST DISCLOSURE

O.C.G.A. § 21-5-70

As used in this article, the term:

(1) "Expenditure":

(A) Means a purchase, payment, distribution, loan, advance, deposit, or conveyance of money or anything of value made for the purpose of influencing the actions of any public officer or public employee;

* * *

(E) The term shall not include:

* * *

(viii) Campaign contributions or expenditures reported as required by Article 2 of this chapter [*i.e.*, under the reporting requirements of the Ethics in Government Act];

* * *

(6) "Lobbyist" means:

* * *

(D) Any natural person who, for compensation, either individually or as an employee of another person, undertakes to promote or oppose the passage of any ordinance or resolution by a public officer specified under subparagraph (F) or (G) of paragraph (15) of Code Section 21-5-3, or any committee of such public officers, or the approval or veto of any such ordinance or resolution;

(E) Any natural person who makes a total expenditure of more than $250.00 in a calendar year, not including the person's own travel, food, lodging expenses, or informational material to promote or oppose the passage of any ordinance or resolution by a public officer specified under subparagraph (F) or (G) of paragraph (15) of Code Section 21-5-3, or any committee of such public officers or the approval or veto of any such ordinance or resolution; or

* * *

O.C.G.A. § 21-5-71

(a) No person shall engage in lobbying as defined by this article unless such person is registered with the State Ethics Commission as a lobbyist.

* * *

(i) The registration provisions of this Code section shall not apply to:

(1) Any individual who expresses personal views, on the individual's own behalf, to any public officer;

* * *

O.C.G.A. § 21-5-73

(a) Each lobbyist registered under this article shall file disclosure reports as provided for in this Code section.

* * *

APPENDIX T

GEORGIA ETHICS IN GOVERNMENT ACT: CAMPAIGN CONTRIBUTIONS

O.C.G.A. § 21-5-3(6)

(6) "Contribution" means a gift, subscription, membership, loan, forgiveness of debt, advance or deposit of money or anything of value conveyed or transferred for the purpose of influencing the nomination for election or election of any person for office, bringing about the recall of a public officer holding elective office or opposing the recall of a public officer holding elective office, or the influencing of voter approval or rejection of a proposed constitutional amendment, a state-wide referendum, or a proposed question which is to appear on the ballot in any county or municipal election. The term specifically shall not include the value of personal services performed by persons who serve without compensation from any sources and on a voluntary basis. The term "contribution" shall include other forms of payment made to candidates for office or who hold office when such fees and compensation made can be reasonably construed as a campaign contribution designed to encourage or influence a candidate or public officer holding elective office. The term "contribution" shall also encompass transactions wherein a qualifying fee required of the candidate is furnished or paid by anyone other than the candidate.

O.C.G.A. § 21-5-34(3)

(3) A candidate for county office or the chairperson or treasurer of such candidate's campaign committee shall file the required campaign contribution disclosure reports with the election superintendent in the respective county of election.